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4-260

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~507.~~ ~~2d~~ 89

THE BOARD OF SUPERVISORS OF KENDALL COUNTY, PLAINTIFF IN ERROR,

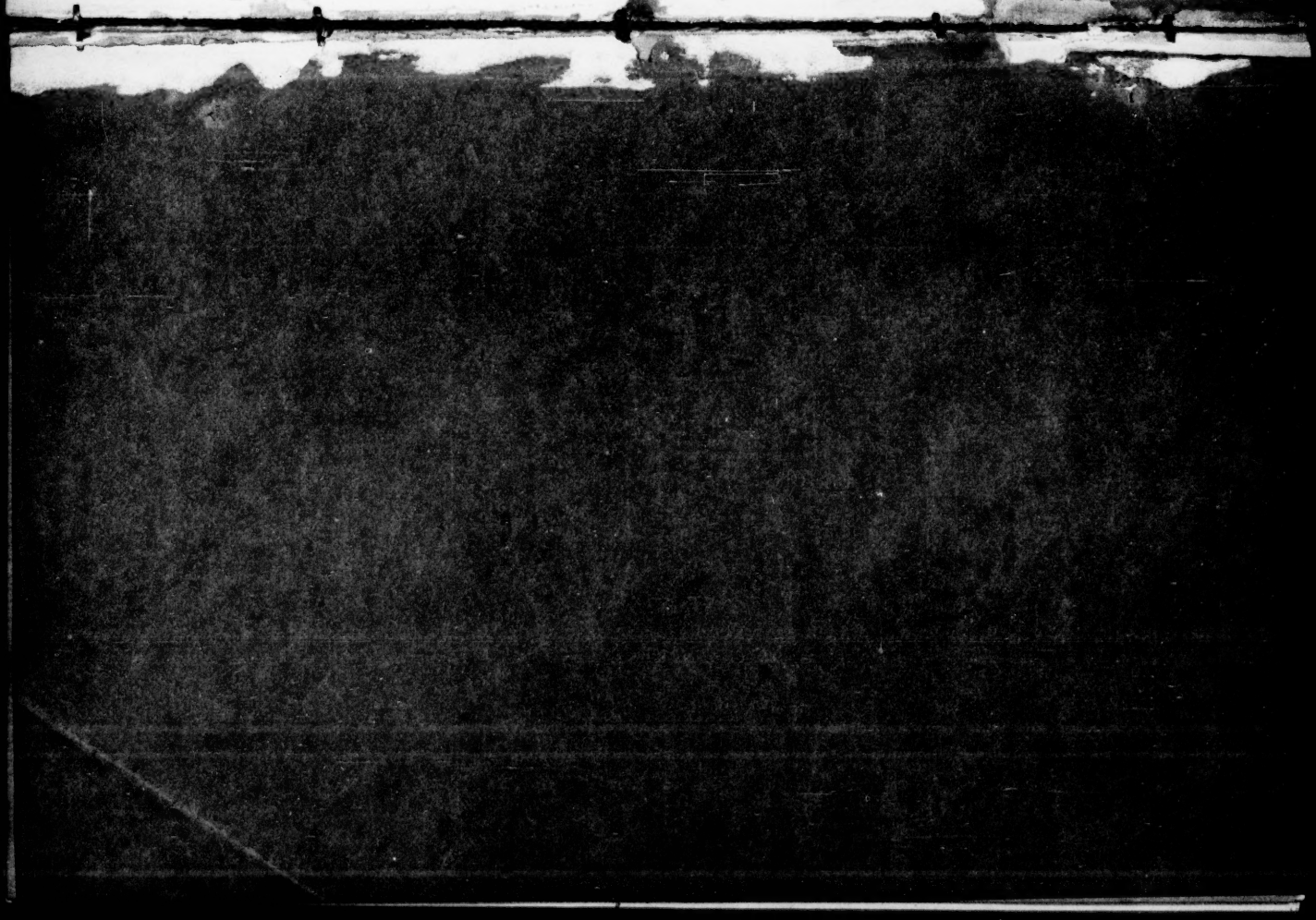
vs.

AUGUSTUS T. POST.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 19, 1874.

Post
Nov 6 1876
Withdrawn
Dismissed



SUPREME COURT OF THE UNITED STATES.

No. 507.

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VS.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

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1 Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court rooms in the city of Chicago, in said district, before the judges thereof, on Friday, the twenty-ninth day of May, in the adjourned May term of said court, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-eighth year.

WILLIAM H. BRADLEY, *Clerk.*

AUGUSTUS T. POST, A RESIDENT AND CITIZEN of the State of New York, *vs.* THE BOARD OF SUPERVISORS OF KENDALL County, a corporation existing by virtue of the laws of the State of Illinois.	Debt.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the 10th day of July, A. D. 1873, the plaintiff in the said-entitled cause, by his attorney, filed in the office
2 of the clerk of said court his præcipe for a writ of summons against the board of supervisors of Kendall County, defendants, which said præcipe is in the words and figures following, to wit:

Præcipe.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Circuit court, October term, A. D. 1873.

AUGUSTUS T. POST, A RESIDENT AND CITIZEN of the State of New York, *vs.* THE BOARD OF SUPERVISORS OF KENDALL County, a corporation existing by virtue of the laws of the State of Illinois.	In debt, $20,000; dam., $20,000.

The clerk will issue summons in the above-entitled cause, directed to the marshal of said district, returnable to the term of said court, A. D. 1873.

Springfield, July 8, 1873.

HAY, GREENE & LITTLER,
Plaintiff's Attorney.

(Endorsed:) Filed July 10th, A. D. 1873. Wm. H. Bradley, clerk.

On the same day, to wit, the 10th day of July, 1873, the said
3 plaintiff filed in the said clerk's office his bond for costs and declaration in said-entitled cause, which said bond and declaration are in the words and figures following, to wit:

Bond for costs.

To the circuit court of the United States for the northern district of Illinois, to the October term, A. D. 1873.

AUGUSTUS T. POST *vs.* THE BOARD OF SUPERVISORS OF KENDALL County.	Debt, $20,000; dam., $20,000.

Hay, Greene & Littler do hereby enter themselves security for costs in this cause, and acknowledge themselves bound to pay or cause to be

paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State.

Dated this 8th day of July, A. D. 1873.

HAY, GREENE & LITTLER.

(Endorsed:) Filed July 10, 1873. Wm. H. Bradley, clerk.

4 *Declaration.*

To the circuit court of the United States of America for the northern district of Illinois, to the October term, A. D. 1873.

Augustus T. Post, a resident and citizen of the State of New York, plaintiff in this suit, by Hay, Greene & Littler, his attorneys, complains of the board of supervisors of Kendall County, Illinois, a corporation created and existing under and by virtue of the laws of the State of Illinois, a resident and citizen of said State of Illinois and the district aforesaid, the defendant in this suit of a plea of debt:

1st. For that whereas the defendant heretofore, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain writing obligatory, commonly called a railroad bond, sealed with the official seal of said county of Kendall and also with the private seal of the chairman of the said board of supervisors, and also attested by the signature of the clerk of said board, the date whereof is the day and year last aforesaid, and now to the court here shown, and then and there delivered the said writing obligatory to the Ottawa, Oswego and Fox River Valley
5 Railroad Company; and which said writing obligatory is in the words and figures following, to wit:

[50-c. rev. st.]

"No. 4.] [$1,000.

Ten per cent. bond.

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed as they respectively become due; and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged. This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand , numbered from one to fifty, inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of
6 a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at

which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars and to issue the bonds of said county therefor; and the said election was by the proper authorities duly declared carried 'for subscription,' previous application, in writing, of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of such subscription, having been made to the clerk of the county court of said county, and the said clerk having called said election in accordance therewith and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID H. SHONTS, [SEAL.]
"*Chairman of Board of Supervisors, Kendall Co.*"

(Written across the face in red ink:) "One thousand dollars.

7 "All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, the 4th day of May, A. D. 1869.

[SEAL KENDALL COUNTY COURT.] "JEREMIAH EVARTS,
"*Clerk.*"

And the said Ottawa, Oswego and Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, for value received, sold and transferred the said writing obligatory to the plaintiff, whereby the plaintiff then and there became the bearer & owner thereof; of all which the said defendant then and there had due notice, to wit, at the district aforesaid; whereby an action hath accrued to the plaintiff to demand and have of and from the defendant said sum of one thousand dollars in the said writing obligatory mentioned, according to the tenor and effect thereof and of the sale and transfer aforesaid.

2. And for that whereas, also, the defendant, afterwards, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of said county of Kendall and also with the private seal of the chairman of the said board of supervisors, and also
8 attested by the signature of the clerk of said board, the date whereof is the date and year last aforesaid, and now to the court here shown, and then and there delivered the said last-mentioned writing obligatory to the Ottawa, Oswego and Fox River Valley Railroad Company, and which said writing obligatory last mentioned is in the words and figures following, to wit:

[Stamp.]

"No. 5. $1,000.

"*Ten per cent. bond.*

"UNITED STATES OF AMERICA,
"*State of Illinois, Kendall County:*

"The county of Kendall, in the State of Illinois, acknowledges itself ndebted in the sum of one thousand dollars, lawful money of the United

States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed as they respectively become due; and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged. This bond is one of a series of fifty bonds bearing
9 even date herewith, each for the sum of one thousand dollars, numbered from one to fifty, inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars and to issue the bonds of said county therefor; and the said election was by the proper authorities duly declared carried 'for subscription,' previous application, in writing, of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of such subscription, having been made to the clerk of the county court of said county, and the said clerk having called said election in accordance therewith and having given due notice of the time and place of holding the same, as required by law
10 and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID H. SHONTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*

(Written across the face in red ink:) "One thousand dollars.

"All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

[SEAL COUNTY COURT.] "JEREMIAH EVARTS, *Clerk.*"

And the said Ottawa, Oswego and Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, for value received, sold and transferred the said last writing obligatory to the plaintiff, whereby said plaintiff then and there became the bearer & owner thereof, of all of which said defendant then had notice, to wit, at the district aforesaid; whereby an action hath accrued to the plaintiff to demand and have of and from the defendant said sum of one thousand dollars in said last writing obligatory mentioned, according to the tenor and effect thereof
11 and of the sale and transfer aforesaid.

3. And for that whereas, also, the said defendant afterwards, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of the county of Kendall aforesaid, and with the private seal of the chairman of the said board of super-

visors, and also attested by the signature of the clerk of said board of supervisors, and now to the court here shown, the date whereof is the day and year aforesaid, and then and there delivered said writing obligatory to the Ottawa, Oswego and Fox River Valley Railroad Company; and which said writing obligatory is in the words and figures following, to wit:

[50-c. rev. stamp.]

"No. 8.] [$1,000.

"*Ten per cent. bond.*

"UNITED STATES OF AMERICA,

"*State of Illinois, County of Kendall:*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego & Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New
12 York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed as they respectively become due; and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged.

"This bond is one of a series of fifty bonds, bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty, inclusive, and is issued in pursuance of an election held in said county, on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego & Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor; and the said election
13 was by the proper authorities duly declared carried 'for subscription,' previous application in writing of fifty legal voters of said county for said election specifying the amount to be subscribed and the conditions of said subscription, having been made to the clerk of the county court of said county, and the said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID H. SHONTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*"

(Written across the face in red ink:) One thousand dollars.

"All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

[SEAL OF KENDALL COUNTY.] "JEREMIAH EVARTS,
"*Clerk.*"

And the said Ottawa, Oswego and Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to
14 wit, the State of New York aforesaid, for value received, sold and transferred said last-mentioned writing obligatory to the plaintiff, whereby said plaintiff then and there became the bearer and owner thereof; of all of which the defendant then and there had due notice, to wit, at the district aforesaid; whereby an action hath accrued to the plaintiff to demand and have of and from the said defendant the said sum of one thousand dollars in said last writing obligatory mentioned, according to the tenor and effect thereof and of the sale and transfer thereof as aforesaid.

4. And for that whereas, also, the defendant afterwards, to wit, on the 4th day of May, A. D. 1873, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of said county of Kendall and with the private seal of the chairman of said board of supervisors, and also attested by the clerk of said board, and now to the court here shown, the date whereof is the day and year last aforesaid, and then and there delivered the same to the Ottawa, Oswego and Fox River Valley
15 Railroad Company; and which said writing obligatory last mentioned is in the words and figures following, to wit:

[50 c't rev. stamp.]

"No. 9.] [$1,000.

"*Ten per cent. bond.*

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed, as they respectively become due; and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged. This bond is one of a series of fifty bonds, bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty, inclusive, and is issued in pursuance of an election held
16 in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor; and the said election was by the proper authorities duly declared carried 'for subscription,' previous application, in writing, of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of such subscription, having been made to the clerk

of the county court of said county, and the said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of
17 said county, by order thereof, has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID H. SHONTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*"

(Written across the face in red ink:) One thousand dollars.

"All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

[SEAL COUNTY COURT, KENDALL CO.]

"JEREMIAH EVARTS, *Clerk.*"

And the said Ottawa, Oswego and Fox River Valley Railroad Company afterwards, to wit, on day and year last aforesaid, at, to wit, the State of New York aforesaid, for value received, sold and transferred the said last-mentioned writing obligatory to the plaintiff, whereby the said plaintiff then and there became the bearer and owner thereof; of all of which the said defendant then and there had due notice, to wit, at the district aforesaid; whereby an action hath accrued to the plaintiff to demand and have of and from the said defendant said sum of one thousand dollars in said last writing obligatory mentioned, according
18 to the tenor and effect thereof and of the sale and transfer as aforesaid.

5. For that whereas, also, the said defendant afterwards, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of said county of Kendall and with the private seal of the chairman of the said board of supervisors, also attested by the signature of the clerk of said board, the date whereof is the day and year last aforesaid, and now to the court here shown, and then and there delivered said last-mentioned writing obligatory to the Ottawa, Oswego & Fox River Valley Railroad Company; and which said last-mentioned writing obligatory is in the words and figures following, to wit:

[50-c. rev. stamp.]

"No. 10.] [$1,000.

'*Ten per cent. bond.*

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego & Fox River Valley Railroad Com-
19 pany, or to the bearer hereof, at the Fourth National Bank, in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the pre-

sentation and delivery of the several coupons hereto annexed as they respectively become due; and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged. This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election a majority of the
20 legal voters participating at the same time voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor; and the said election was by the proper authorities duly declared carried 'for subscription,' previous application, in writing, of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of such subscription, having been made to the clerk of the county court of said county, and the said clerk having called said election in accordance therewith and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID H. SHONTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*

(Written across the face in red ink:) "One thousand dollars.

"All of which is attested by the clerk of the county court of said county, and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

[SEAL KENDALL CO. COURT.] "JEREMIAH EVARTS, *Clerk*."

21 And the said Ottawa, Oswego & Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of New York, aforesaid, for value received, sold and transferred the said last-mentioned writing, obligatory to the plaintiff, whereby said plaintiff then and there became the bearer and owner thereof, of all of which the said defendant then and there had due notice, to wit, at the district aforesaid; whereby an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of one thousand dollars in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof and of the sale and transfer thereof as aforesaid.

6. And for that whereas, also, the said defendant afterwards, to wit, on the 4th day of May, A. D. 1869, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of said county of Kendall and the private seal of the chairman of said board of supervisors, and also attested by the signature of the clerk of said board, and now to the court here shown, the date whereof is
22 the day and year aforesaid, and then and there delivered said last aforesaid writing obligatory to the Ottawa, Oswego and Fox River Valley Railroad Company; and which said last aforesaid writing obligatory is in the words and figures following, to wit:

[50-c rev. stamp.]

"No. 11.] [$1,000.

"*Ten per cent. bond.*

'UNITED STATES OF AMERICA,

"*State of Illinois, County of Kendall:*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego & Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed as they respectively become due; and to the payment of which said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged. This bond is one of a series of fifty bonds bearing even
23 date herewith, each for the sum of one thousand dollars, numbered from one to fifty, inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars and to issue the bonds of said county therefor; and the said election was by the proper authorities duly declared carried 'for subscription,' previous application, in writing, of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of such subscription, having been made to the clerk of the court of said county, and the said clerk having called said election in accordance therewith and having given due notice of the time and place of holding the same, as required by law and the act afore-
24 said.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID H. SHONTS, [SEAL.]

"*Chairman of Board of Supervisors of Kendall Co.*

(Written across the face in red ink:) One thousand dollars.

"All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors under his hand and the seal of said court at Yorkville, this 4th day of May, A. D. 1869."

[SEAL CO. COURT, KENDALL CO.] "JEREMIAH EVARTS,

Clerk."

And the said Ottawa, Oswego & Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, for value received, sold and transferred said last aforesaid writing obligatory to the plaintiff, whereby the said

plaintiff then and there became the bearer and owner thereof, of all of which said defendant then and there had due notice, to wit, at the district aforesaid; whereby an action hath accrued to the plaintiff to demand and have of and from the defendant said sum of one thousand dollars in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof, and of the sale and transfer thereof as aforesaid.

7. For that whereas the said defendant afterwards, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of said county of Kendall and with the private seal of said board of supervisors, and also attested by the signature of the clerk of said board, and now to the court here shown, the date whereof is the day and year last aforesaid, and then and there delivered the said last aforesaid writing obligatory to the Ottawa, Oswego & Fox River Valley Railroad Company; and which said last aforesaid writing obligatory is in the words and figures following, to wit:

[50c. rev. stamp.]

"No. 12. $1,000.

"UNITED STATES OF AMERICA,
"*State of Illinois County of Kendall:*

"*Ten per cent. bond.*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand , lawful money of the United States of America; which sum the said county of Kendall promise' to pay to the Ottawa, Oswego & Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually, at said bank upon the presentation and delivery of the several coupons hereto annexed as they respectively become due. And to the payment of said principal and interest in the manner aforesaid, the faith and revenue of said county is hereby irrevocably pledged.

"This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty, inclusive, and issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns and townships, to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor, and the said election was by the proper authorities duly declared carried 'for subscription,' previous application in writing of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of said subscription having been made to the clerk of the county court of said county, and the said clerk having called said election in ac-

cordance therewith, and having given due notice of the time and place of business of holding the same as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially, this fourth day of May, A. D. 1869.

"DAVID H. SHORTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*"

(Written across the face in red ink:) One thousand dollars.

"All of which is attested by the clerk of the county court of said county, and ex-officio clerk of said board of supervisors, under his hand and the seal of court, at Yorkville, this 4th day of May, A. D. 1869.

SEAL OF COUNTY COURT KENDALL CO.

"JEREMIAH EVARTS, *Clerk.*"

And the said Ottawa, Oswego and Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to
28 wit, the State of New York aforesaid, sold, transferred, and delivered the said last aforesaid writing obligatory to the plaintiff, whereby the said plaintiff then and there became the bearer and owner thereof, of all of which the said defendant then and there had due notice, to wit, at the district aforesaid, by means whereof an action hath accrued to the plaintiff to demand and have of and from the said defendant the said sum of one thousand dollars, in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof, and of the sale and transfer thereof as aforesaid.

8. And for that whereas, also, the said defendant afterwards, to wit, on the 4th day of May. A. D. 1873, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of the said county of Kendall, and with the private seal of said board of supervisors, and also attested by the signature of the clerk of said board, and now to the court here shown, the date thereof is the day and year last aforesaid, and then and there delivered the said last aforesaid writing obligatory to the Ottawa, Oswego & Fox River Valley Railroad Company; and which
29 last aforesaid writing obligatory is in the words and figures following, to wit:

[5-ct. rev. stamp.]

"No. 13. $1,000.

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

Ten per cent. bond.

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank, in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed

as they respectively become due, and to the payment of said principal and interest, in the manner aforesaid, the faith and revenue of said county is hereby irrevocably pledged.

"This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty inclusive, and is issued in pursuance of an election held in said county, on the 30th day of March, A. D. 1869,
30 under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads.' The said act having special reference to the said Ottawa, Oswego & Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted for subscription to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor; and the said election was, by the proper authorities, duly declared carried 'for subscription,' previous application, in writing, of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of said subscription having been made to the clerk of the county court of said county; and the said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law, and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature, officially, this fourth day of May, A. D. 1869.

31 "DAVID H. SHORTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*"

(Written across the face in red ink:) One thousand dollars.

"All of which is attested by the clerk of the county court of said { SEAL COUNTY CT. } county, and ex-officio clerk of said board of super- { KENDALL CO. } visors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

"JEREMIAH EVARTS, *Clerk.*"

And the said Ottawa, Oswego & Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, for value received, sold, transferred, and delivered the said writing obligatory last mentioned to the plaintiff, whereby said plaintiff then and there became the owner and bearer thereof, of all of which the defendant then and there had due notice, to wit, at the district aforesaid; by means whereof an action hath ac*cur*red to the plaintiff to demand and have of and from the said defendant the said sum of one thousand dollars in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof, and of the sale and transfer thereof as aforesaid.

9. And for that whereas also the defendant afterwards, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid,
32 made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of said county of Kendall and with the private seal of the chairman of said board of supervisors, and also attested by the signature of the clerk of said board, and now to the court here shown. The date thereof is the day and year aforesaid; and said defendant then and there delivered said last aforesaid writing obligatory to the Ottawa, Oswego and Fox River Valley Rail-

road Company; and which said writing obligatory is in the words & figures following, to wit:

[50 ct. rev. stamp.]

"No. 14. $1.000.

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

"*Ten per cent. bond.*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego & Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank, in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and
33 delivery of the several coupons hereto annexed as they respectively become due, and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged.

"This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads;' the said act having special reference to the said Ottawa, Oswego & Fox River Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor; and the said election was, by the proper authorities, duly declared carried for subscription, previous application in writing of fifty legal voters of said county
34 for said election, specifying the amount to be subscribed, and the conditions of such subscription, having been made to the clerk of the county court of said county, and the said clerk having given due notice of the time and place of holding the same as required by law, and the act aforesaid. In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID H. SHORTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*"

(Written across the face in red ink: One thousand dollars.

"All of which is attested by the clerk of the county court of said county, and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

"JEREMIAH EVARTS, *Clerk.*"

[SEAL COUNTY CT. KENDALL CO.]

And the said Ottawa, Oswego & Fox River Valley Railroad Company afterwards, to wit, on the day & year last aforesaid, at, to wit, the State

of New York aforesaid, for value received, sold and transferred said last aforesaid writing obligatory to the plaintiff, whereby said plaintiff then and there became the bearer and owner thereof, of all of which defendant then and there had due notice; by means whereof an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of one thousand dollars in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof, and of the sale and transfer thereof aforesaid.

10. And for that whereas, also, the said defendant afterwards, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of the said county of Kendall, and with the private seal of said board of supervisors, and also attested by the signature of the clerk of said board, and now to the court here shown, the date whereof is the day and year aforesaid; and which said last aforesaid writing obligatory the defendant then and there delivered to the Ottawa, Oswego and Fox River Valley Railroad Company; said writing obligatory last aforesaid is in the words and figures following, to wit:

[50-c. rev. st'p.]

"No. 15. $1,000.

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

"*Ten per cent. bond.*

36 "The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank, in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed, as they respectively become due, and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged.

"This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty, inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of the said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties,
37 incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor; and the said election was, by the proper authorities, duly declared carried 'for subscription,' previous application in writing of fifty legal voters of said county for said election, specifying the amount to be subscribed and the

conditions of such subscription having been made by the clerk of the county court of said county, and the said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially, this fourth day of May, A. D. 1869.

"DAVID H. SHORTS, [SEAL.]
"*Chairman of the Board of Supervisors of Kendall Co.*"

(Written across the face in red ink:) One thousand dollars.

38 "All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

SEAL COUNTY COURT OF KENDALL COUNTY.

"JEREMIAH EVARTS, *Clerk.*"

And the said Ottawa, Oswego and Fox River Valley Railroad Company afterward, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, sold, transferred, and delivered the said last aforesaid writing obligatory to the plaintiff, and said plaintiff thereby then and there became the bearer and owner thereof, of all of which the defendant then had due notice, to wit, at the district aforesaid; by means whereof an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of one thousand dollars, in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof, and of the sale and transfer thereof aforesaid.

11. And for that whereas, also, the said defendant afterwards, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of the said county of Kendall and
39 with the private seal of the chairman of said board of supervisors, attested also by the signature of the clerk of said board, and now to the court here shown, the date whereof is the day and year last aforesaid, and said defendant then and there delivered the same to the Ottawa, Oswego and Fox River Valley Railroad Company; and which said last-mentioned writing obligatory is in the words and figures following:

[50c. rev. stamp.]

"No. 16. $1,000.

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

"*Ten per cent. bond.*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank, in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per

annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed as they respectively
40 become due; and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged.

"This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty, inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the Legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads.' The said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor, and the said election was, by the proper authorities, duly declared carried 'for subscription,' previous application in writing of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of said subscription, having
41 been made to the clerk of the county court of said county, and the said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID A. SHORTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*"

(Writen across the face in red ink:) One thousand dollars.

"All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May A. D. 1869.

[SEAL COUNTY COURT KENDALL COUNTY.] "JEREMIAH EVARTS, *Clerk.*"

And the said Ottawa, Oswego and Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, sold, transferred, and delivered the last-mentioned writing obligatory to the plaintiff, and said plaintiff then and there thereby became the bearer and owner thereof, of all of which the defendant had due notice, to wit, at the district aforesaid; by
42 means whereof an action hath accrued to the plaintiff to demand and have of and from the said defendant the said sum of one thousand dollars in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof, and of the sale and transfer thereof as aforesaid.

12. And for that whereas, also, the said defendant afterward, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of said county of Kendall and with the private seal of the chairman of said board of supervisors, and also attested by the clerk of said board, and now to the court here shown, the date whereof is

the day and year last aforesaid, and said defendant then and there delivered the same to the Ottawa, Oswego and Fox River Valley Railroad Company; and which said writing obligatory is in the words and figures following:

[50 c. rev. stamp.]

"No. 17. $1,000.

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

"*Ten per cent. bond.*

"The county of Kendall, in the State of Illinois, acknowledges
43 itself indebted in the sum of one thousand dollars lawful money of the United States of America, which sum the said county of Kendall promise' to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank, in the city New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed, as they respectively become due; and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged.

"This bond is one of a series of fifty bonds, bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,'
44 the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor; and the said election was, by the proper authorities, duly declared carried 'for subscription,' previous application having been made to the clerk of the county court of said county, and the said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors thereof has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID H. SHORTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*"

(Written across the face in red ink:) One thousand dollars.

"All of which is attested by the clerk of the county court of said county, and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

[SEAL CO. CT. KENDALL CO.] "JEREMIAH EVARTS, *Clerk.*"

45 And the said Ottawa, Oswego and Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid,

at, to wit, the State of New York aforesaid, for value received, sold, transferred, and delivered the said last aforesaid writing obligatory to the plaintiff, and said plaintiff thereby then and there became the bearer and owner thereof; of all of which defendant then and there had due notice, to wit, at the district aforesaid; whereby an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of one thousand dollars in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof and of the sale and transfer thereof as aforesaid.

13. And for that whereas, also, the said defendant afterwards, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official of the said county of Kendall and with the private seal of the chairman of said board of supervisors, attested
46 also by the signature of the clerk of said board, and now to the court here shown, the date whereof is the day and year last aforesaid, and defendant then and there delivered the same to the Ottawa, Oswego and Fox River Valley Railroad Company; and which said last aforesaid writing obligatory is in the words and figures following, to wit:

[50 ct. rev. stamp.]

"No. 18. $1,000.

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

"*Ten per cent. bond.*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county of Kendall promise' to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank, in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed, as they respectively become due; and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged.

47 "This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act *of a certain act* of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor, and the said election was by the proper authorities duly declared carried for subscription, previous application in writing of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of such subscription, having been made

to the clerk of the county court of said county, and the said clerk
48 having called said election in accordance therewith, and having given due notice of the time and place of holding the same as required by law and the act aforesaid. In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially this fourth day May, A. D. 1869.

[SEAL.] "DAVID H. SHORTS,
"*Chairman of Board of Supervisors of Kendall Co.*"

(Written across the face in red ink:) One thousand dollars.

"All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 18 69.

[SEAL CO. CT. KENDALL CO.] "JEREMIAH EVARTS, *Clerk.*"

And the said Ottawa, Oswego and Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, for value received, sold, transferred, and delivered the said last aforesaid writing obligatory to the plaintiff, and said plaintiff thereby then and there became the bearer and owner thereof, of all of which the defendant then and there had due notice, to wit, at the district aforesaid.

By means whereof an action hath accrued to the plaintiff to
49 demand and have of and from the defendant the said sum of one thousand dollars in said last aforesaid writing obligatory mentioned, acording to the tenor and effect thereof, and of the sale and transfer thereof aforesaid.

And for that whereas also the said defendant afterwards, to wit, on the 1st day of January, A. D. 1873, at, to wit, the district aforesaid, became and was indebted to the plaintiff in the further sum of five thousand dollars, good and lawful money of the United States of America, as interest upon and for the forbearance of divers large sums of money before then due and owing by the defendant to the plaintiff, and by the plaintiff forborne to the defendant for divers long spaces of time before then elapsed, at its request; and being so indebted, the defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, undertook and then and there agreed to pay to the plaintiff the said sum of five thousand dollars in this count mentioned, when it, the defendant, should be thereunto afterwards requested.

Nevertheless, the defendant, though often requested so to do, has
50 not as yet paid the plaintiff said several sums of money in this declaration mentioned, or any or either of them, or any part thereof, but to pay him the same the defendant has hitherto wholly neglected and refuse', and still refuses, to the damage of the plaintiff in the sum of twenty thousand dollars; and therefore he brings his suit, &c.

HAY GREENE & LITTLER,
His Attorneys.

(Endorsed:) Filed July 10, 1873. Wm. H. Bradley, clk.

Afterwards, to wit, on the 25th day of July, A. D. 1873, a writ of summons issued out of said clerk's office in said entitled cause, which said writ, together with the return of the marshal annexed, is in words and figures following, to wit:

Summons.

Circuit court of the United States of America, northern district of Illinois, *ss:*

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon the board of supervisors of Kendall County, if found in your district, to be and appear before our
51 judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Augustus T. Post in a plea of debt twenty thousand dollars, to his damage, as he alleges, of twenty thousand dollars; and have you then and there this writ.

Witness the Hon. Nathan Clifford, Acting Chief-Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 25 day of July, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the 98th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

Special deputy's return.

UNITED STATES OF AMERICA,
Northern District of Illinois, ss:

Know all men by these presents that I have appointed, and by these presents do appoint, my true and lawful deputy to execute the annexed writ, Aug. T. Post vs. The Board of Supervisors of Kendall Co.,
52 and to make true return of the execution thereof according to law.

B. H. CAMPBELL, [SEAL.]
United States Marshal for the Northern District of Illinois.

I have this 5th day of September, A. D. 1873, executed the annexed writ by delivering a true copy thereof to Chas. Raymond, the chairman of the board of supervisors of said county, and also by delivering a true copy thereof to Jeremiah Evarts, clerk of the board of supervisors of the within-named county therein named.

B. H. CAMPBELL,
United States Marshal for the Northern District of Illinois,
By FRANK R. SMILEY,
Special Deputy.

Frank R. Smiley, being first duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return.

Sworn to before me this 13 day of September, A. D. 187 .

P. A. HORYNE, *U. S. Comr.*

(Endorsed:) Filed Oct. 1st, A. D. 1873. Wm. H. Bradley, clerk.

53 Afterwards, to wit, on the 15th day of October, A. D. 1873, the said defendant, The Board of Supervisors of Kendall County, by its attorney, T. Lyle Dickey, filed in said clerk's office its pleas; which said pleas, as finally amended, are in the words and figures following, to wit:

Pleas.

In the circuit court of the United States in & for the northern district of Illinois, to the October term, 1873.

AUGUSTUS T. POST
vs.
THE BOARD OF SUPERVISORS OF KENDALL County. } Action, debt.

And the said defendant comes, by T. Lyle Dickey, its attorney, and defends the wrong & injury when, &c., and, for plea to each of the first thirteen counts in said declaration, respectively, says as to each of said counts that said supposed writing obligatory mentioned is not the deed of the said county of Kendall; & of this it puts itself upon the country, &c.

DICKEY, *for Deft.*

54 2D PLEA.—And for a further plea to each of the first thirteen counts in plaintiff's said declaration, defendant says as to each of said counts & the matters therein respectively alleged, that plaintiff ought not to have & maintain his said action by reason of said count & the matters therein alleged, because defendant says that said supposed "act of the legislature of said State of Illinois, approved February 18th, 1857," (mentioned in the recitals in said supposed bond, which is set out in count,) never did become and never was a law of the State of Illinois, in this, that said supposed "act of the legislature" purports to have been enacted by the people of the State of Illinois, represented in the general assembly, at the regular session thereof, convened on the 5th day of January, A. D. 1857, and that upon the journals of the proceedings of each house of said general assembly, kept in pursuance of the 13th section of the 3d article of the then constitution of said State, were made the following entries relating to a bill for said supposed act of said legislature and no other or further entries relating to said act, or to any bill for such
55 act, were ever made upon the said journals or upon either of them; that is to say, upon the journal of the house of representatives of said general assembly so kept, it appears from the entries therein that on the 22d day of January, A. D. 1857, there was introduced "a bill for an act authorizing certain cities, counties, incorporated towns, & townships, to subscribe to the stock of certain railroads," and that said bill was on that day read a first time in said house and ordered to a second reading, and by order of the said house the rule was dispensed with, & that said bill was on that day read a second time by its title, and referred to the committee on internal improvements. And that on the 4th day of February, A. D. 1857, said bill was reported back to said house of representatives from said committee, without amendment, & with a recommendation from said committee that said bill should be passed, & that on that day said bill was by said house of representatives "ordered to a third reading." And that on the 14th day of February, A. D. 1857, said bill was taken up in said house of representatives and read
56 a third time and passed by said house, and that the vote upon said final passage of said bill in said house was by ayes and noyes, and on said final passage the vote taken was 54 "ayes" and no "nays," and that on that day it was ordered by the said house that the title of said bill be as aforesaid and that the clerk inform the senate thereof and ask the concurrence of the senate therein. And upon the journal of the

senate of said general assembly, so kept, it appears from the entries of the proceedings of said senate in said journal, that on the 14th day of February, A. D. 1857, said bill so passed as aforesaid by said house of representatives was duly presented to said senate from said house of representatives, and that the senate was, in behalf of said house, informed of the passage of said bill by said house of representatives, and the concurrence of the said senate in the passage thereof was requested, and that on the 16th day of February, A. D. 1857, said bill came up in said senate, and was read a first time in said senate, and ordered by
57 said senate to a second reading, and that the rule was suspended, and said bill was on that day read a second time by its title and referred by said senate to the committee on banks & corporations. And upon the journal of the proceedings of said house of representatives of said general assembly, so kept, it appears from the entries of the proceedings therein that on the 17th day of February, A. D. 1857, a message from the senate, by Mr. Wyatt, assistant secretary, was received by said house of representatives, which was as follows, viz:

"Mr. SPEAKER: I am directed to inform the House of Representatives that the senate have concurred with them in the passage of the following bills, viz, * * * * a bill for 'An act authorizing certain cities, counties, incorporated towns, & townships to subscribe to the stock of certain railroads;'" and that on the same day said bill was duly reported (from the committee of said house of representatives on engrossed & enrolled bills) as correctly enrolled. And that on the 18th day of February, A. D. 1857, a message was received by said house of representatives from the governor of said State, informing them that the said governor had approved and signed said bill.

58 And defendant further avers that no other proceedings than those above stated as appearing from the entries upon said journals were ever had or done by the said general assembly, or by either house thereof, relating to said bill, or relating to any bill for said supposed "act of the legislature," and that no other proceedings of either said senate or said house of representatives, relating to said bill or relating to any bill for said supposed act of said legislature, were ever entered in the said journal of said senate or in the journal of said house of representatives, and that no other bill for said supposed act of said legislature, or relating thereto, was ever introduced into either house of said general assembly, or acted upon either by said house of representatives or by said senate. And that said bill for said supposed act of said legislature was not in fact read on three different days in said senate, nor was the rule requiring that to be done ever dispensed with, (so
59 far as relates to a third reading of said bill,) by said senate, as provided for in the then constitution of said State, and that said bill was never read in said senate a third time by its title or otherwise.

And that said bill was never put upon its final passage in said senate; nor was any vote taken in said senate, by ayes & nays, upon the final passage of said bill; nor was any such vote entered upon the journal of said senate; nor was there ever any vote taken in said senate relating to said bill upon the question, "Shall the bill pass?" nor was Mr. Wyatt, assistant secretary of the senate, or any other person, authorized or directed by said senate "to inform the house of representatives that the senate had concurred with the house in the passage of said bill, & so defendant says that said supposed act of the legislature of the State of Illinois," approved February 18th, 1857, never became or was a law of the State of Illinois. And defendant further avers that a majority of the qualified voters of said county of Ken-

60 dall, (taking as a standard the number of votes thrown at the last general election previous the vote upon the question of the said supposed subscription of stock & the issue of said supposed bonds) did not vote in favor of the same. And defendant further avers that the election (in pursuance of which it is alleged said bond was issued) was not called by the board of supervisors of said county of Kendall.

And defendant further avers that the call for said election was not made thirty days before the holding of said election. And defendant further alledges that no notices for said election were issued thirty days before said election, and no notice for said election was given thirty days before said election; and that thirty days' notice of said election was not given by said board of supervisors. And defendant avers that the notices for said election did not specify the time the said proposed bonds were to run, nor did said notices specify the interest which
61 said bonds were to bear; without this, that said supposed writing obligatory in said count mentioned is the deed of said county of Kendall, and this defendant is ready to verify, &c.

DICKEY, *for Deft.*

And for a plea to the 14th count in said plaintiff's declaration, defendant says actio non, because defendant says that said Kendall County does not owe the said sum of money above demanded in said count, or any part thereof, in manner & form as plaintiff hath in said count alleged; and of this the defendant puts itself upon the country, &c.

DICKEY, *for Deft.*

(Endorsed:) Filed Oct. 15, 1873. Wm. H. Bradley, clk.

62 Afterwards, to wit, on the 4th day of May, A. D. 1874, said plaintiff, by his attorneys, filed in said clerk's office his demurrer to said second plea, which said demurrer is in the words and figures following, to wit:

Demurrer to 2nd plea.

United States circuit court for northern district of Illinois, to the March term, 1874.

AUGUSTUS T. POST
ats.
THE BOARD OF SUPERVISORS OF KENDALL County. } Debt.

And the said plaintiff, as to the plea of the defendant by it secondly above pleaded, saith that the same and the matters therein contained in manner and form, as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against the said defendant, and that the said plaintiff is not bound by law to answer the same, and this the said plaintiff is ready to verify. Wherefore by reason of the insufficiency of the said plea in this behalf the said
63 plaintiff prays judgment and his damages, &c.

HAY, GREENE & LITTLER,
Attys. for Plaintiff.

And the said plaintiff, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of special demurrer to the said plea of the defendant by it secondly above pleaded, to wit:

1st. The plea contains divers new and immaterial matters in this, to wit, it recites the several steps taken by the said legislature of the State of Illinois in relation to the passage of the said law under and by virtue of which the bonds in said declaration mentioned were issued, and is not confined in its recitals and averments to the alleged defects of the journal of the said Senate in relation to the passage of said law.

2d. The said plea contains more than one defense to said cause of action in this, to wit, it first alleges the non-passage of the law by the legislature of Illinois under which the said bonds purport to have been issued, and also alleges that a majority of the qualified voters of
64 said county of Kendall (taking as a standard the number of votes thrown at the last general election previous to the vote upon the question of said supposed subscription) did not vote in favor of the same; said plea also avers that said election was not called by the proper authorities, that no sufficient notice of said election was given either as to the time of posting the same or as to the contents thereof, by reason of which said several matters contained in the said plea plaintiff avers that the same is bad for duplicity.

3. And also that the said plea should conclude with a verification and not to the country.

4. And also that the said plea is multifarious and uncertain.

5. And also that the said plea is in other respects uncertain, informal, and insufficient; wherefore, &c.

HAY, GREENE & LITTLER,
Attys. for Plaintiff.

(Endorsed:) Filed May 4th, 1874. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 5th day of May, in the adjourned May term, A. D. 1874, of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Thomas Drummond, judge,
65 appears the following entry, to wit:

AUGUSTUS T. POST
vs.
THE BOARD OF SUPERVISORS OF KENDALL County. } Debt.

Now come the parties, by their attornies, and the defendant, by its attorney, confesses the special and general demurrer of the plaintiff to the second plea of the defendant filed herein, and on motion leave is given the defendant to amend its said second plea, the same to be done in two weeks.

Afterwards, to wit, on the 19th day of May, in the adjourned May term, A. D. 1874, of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

AUGUSTUS T. POST
vs.
THE BOARD OF SUPERVISORS OF KENDALL County. } Debt.

Now come the parties, by their attorneys, and on motion of the defendant, by its attorney, leave is given it to amend its second plea here-

in, by striking therefrom the words "conclusion to the country,"
66 and by inserting therein in lieu thereof the words "and this the defendant is ready to verify," to which amended plea the plaintiff by leave of the court re-files his demurrer, and the same coming on now to be heard, after hearing a part of the arguments of counsel, the hour of adjournment having arrived, the further hearing is postponed until to-morrow morning.

Afterwards, to wit, on the 20th day of May, in the adjourned May term, A. D. 1874, of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

AUGUSTUS T. POST
vs.
THE BOARD OF SUPERVISORS OF KENDALL County. } Debt.

Now come again the parties, by their attorneys, and after hearing the concluding arguments of counsel upon the demurrer of the plaintiff to the amended second plea herein, the court, being sufficiently advised in the premises, sustains said demurrer.

Afterwards, to wit, on the 28th day of May, A. D. 1874, said defendant, by its attorneys, filed in said clerk's office the affidavit of Henry
66½ W. Farley, which is as follows:

In the circuit court of the United States in and for the northern district of Illinois, to the October term, 1873.

AUGUSTUS T. POST
vs.
THE BOARD OF SUPERVISORS OF KENDALL County. } Action, debt.

HENRY W. FARLEY, being duly sworn, deposes and says that he is a member of the board of supervisors of Kendall County, defendant in the above-entitled suit, & that he is the chairman of a committee appointed by order of said board to conduct and manage in behalf of said county the defence of the county in said suit, & is the agent of the county in that behalf.

Affiant further says, upon information & belief & advice of counsel, that the alleged bonds upon which said above-named suit is brought were never executed by said county by any one having lawful authority to execute the same in behalf of said county, & that said supposed bonds are not, nor is either of them, the deed of said county; and that in that regard the pleas of the defendant filed in the above-entitled suit on the 15th of October, 1873, are true in substance & in fact.

HENRY W. FARLEY.

Sworn to & subscribed before me this 28th day of May, A. D. 1874.
WM. H. BRADLEY, *Clk.*

(Endorsed:) Filed May 28, '74. Wm. H. Bradley, clk.

Afterwards, to wit, on the 29th day of May, in the adjourned May
67 term, A. D. 1874, of said court, in the record of the proceedings

thereof in said-entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

AUGUSTUS T. POST
vs.
THE BOARD OF SUPERVISORS OF KENDALL County. } Debt.

Now come the parties, by their attorney, and upon issue joined thereupon come a jury of good and lawful men, to wit: H. McCleary, W. Haven, G. Sammonds, F. Crow, W. Campbell, S. Hyman, J. Bennett, A. H. Palmer, Charles Miller, C. Roberts, J. M. Lomis, and C. Davis, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing the evidence and the arguments of counsel, and receiving the instructions of the court, the jury returned into court the following verdict, to wit: We, the jury, find the issue for the plaintiff, and find his debt in the sum of thirteen thousand dollars, and assess his damages for the detention of said debt to the sum of eleven hundred and eighty-eight dollars and five cents; and thereupon the defendant, by its attorney, moves the court for a new trial herein; and the court being now fully advised thereon overrules the same.

68 It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of eleven hundred and eighty-eight dollars and five cents, for debt and damages, together with his costs and charges in this behalf expended, amounting to the sum of one hundred & thirty-eight dollars and fifty-five cents.

On the hearing of said cause the following exceptions were taken, and were allowed by the court and made of record, and are in the words and figures following, to wit:

Bill of exceptions.

In the circuit court of the United States in & for the northern district of Illinois.

AUGUSTUS T. POST, PLAINTIFF,
vs.
THE SUPERVISORS OF KENDALL COUNTY. } Action of debt.

Be it remembered that at the trial of this action, before the jury, on Friday, May 29th, 1874, the plaintiff read in evidence thirteen bonds each for the sum of one thousand dollars, (numbered severally 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, and 18,) purporting to be the

69 bonds of Kendall County, Illinois, each dated May 4th, 1869, each signed David Shontz, chairman of the board of supervisors, and attested by the signature "Jeremiah Evarts, clerk of the county court of Kendall County," & the seal of said court. It was admitted by defendant that David Shontz was at that date such chairman, & that the signatures respectively to said bonds are genuine, and that Jeremiah Evarts was at that time clerk of the county court of Kendall County, & that his signatures to the bonds were genuine; said bonds were substantially the same in words as alleged in the 1st 13 counts of said declaration in this action, & each of said bonds contained recitals in the words & figures following, to wit:

"This bond is one of a series of fifty bonds bearing even date herewith each for the sum of $1,000, numbered from one to fifty, inclusive, issued

in pursuance of an election held in said county on the 30th day of March, A. D. 1869, made & by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego & Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad company in the sum of $50,000, and to issue the bonds of said county therefor; and the said election was by the proper authorities declared carried 'for subscription,' previous application in writing of fifty legal voters of said county for said election, specifying the amount to be subscribed, and the conditions of such subscription, having been made to the clerk of the county court of said county, and the said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same as required by law and the act aforesaid."

Thereupon defendants produced as a witness JEREMIAH EVARTS, who, being duly sworn, testified that he is the clerk of the county court of Kendall County, & has been such clerk since 1864, and he is the man who attested and signed the bonds above mentioned as clerk.

(Mr. Dickey, attorney for defendants, thereupon presented to the witness a certified transcript of certain orders of the board of supervisors, from the records kept in the office of the clerk of the county court of Kendall County; and witness testified:)

That the same is a full & true transcript of all the orders of the board of supervisors of Kendall County on the records in his office relating to the subject of the issuing of these bonds. Witness also testified that the signature to the certificate attached to said transcript was his genuine signature, & the seal attached thereto was the seal of the said county court.

(Defendant's counsel thereupon offered to read the transcript of each of said orders in evidence to the jury.)

The following is a full copy of so much of the same as has any relation to the issue of said bonds & the purpose for which the same were issued, viz:

At a special meeting of said board of supervisors, held at Yorkville, April 27th, 1869, the following proceedings were had & recorded:

"On motion, a committee of three was appointed by the chair, to whom was referred the matter of issuing the said railroad bonds by the county of Kendall to the amount of $50,000, to aid in building the Ottawa, Oswego & Fox River Valley Railroad. The chair appointed Mess. E. A. Black, J. S. Seely, and C. H. Raymond as such committee. The matter was discussed at great length, when the committee made the following report:

"To the Hon. Board of Supervisors of Kendall County:

"Your committee, to whom was referred the proposition of said railroad company, this day made, in reference to issuing $50,000 in railroad bonds, to be placed in the hands of trustees, would respectfully report as follows: That we would recommend the immediate issuing of said bonds, drawing ten per cent. interest, payable annually by Kendall County, provided the following be complied with: the said bonds are not to be used for any purpose except to build said Ottawa, Oswego & Fox River Valley Railroad through said Kendall County, and the said

bonds are to be delivered to the contractor of said railroad by the appointed trustees or custodians of said bonds on the certificate of the engineer of said railroad company, with the endorsement of the
73 local trustee or custodian, R. C. Mix, of Aurora, Illinois, as to or on an estimate of work done or material furnished in the construction of said railroad through said county.

"A. E. BLACK,
"J. S. SEELY,
"C. H. RAYMOND,
"*Com.*

"Report accepted and adopted.
"Board adjourned."

At a meeting of the board May 4th, 1869, the following proceedings were had and recorded:

"MAY 4th, 1869.

"*Special meeting of the board of supervisors of Kendall County.*

"The call for the meeting was read by the clerk, and the minutes of the meeting of April 27th read, and the approval laid over till afternoon.

"AFTERNOON SESSION.

"The minutes of April 27th were again read, and on motion the report of the committee was amended by substituting for R. C. Mix, of Aurora, J. W. Austin, of Bristol, as local custodian or trustee, and to require the Ottawa, Oswego and Fox River Valley Railroad Company to give
74 a bond to the county of Kendall and to the towns of Oswego, Kendall, and Fox, jointly, in the penal sum of $200,000, that said road shall be completed by the 1st day of July, 1871; and thus amended the proceedings of said meeting were adopted. On motion, a committee of three was appointed by the chairman to draft resolutions embracing the matter of issuing said bonds, the time and manner when they shall be paid, and the conditions of delivery and payment thereon, consisting of J. P. Seely, J. McGrath, and L. H. Wheeler, who agreed upon *and* the following report, Mr. Wheeler not concurring therein:

"To the Hon. Board of Supervisors:

"Your committee would respectfully submit to your consideration the following report and resolutions:

"Whereas at a special election had in the county of Kendall, and State of Illinois, on the 30th day of March, 1869, the people of said county voted to subscribe $50,000 to aid in building the Ottawa, Oswego and Fox River Valley Railroad when satisfactory assurance should be made to the board of supervisors of said county that said road would be
75 built; and whereas the officers of said railroad company have made a contract for the building of said road from Streator to Geneva, Illinois, which contract has been laid before said board of supervisors, and satisfactorily and agreed by said railroad company and Oliver H. Young, the contractor, that the bonds of said county and other counties, and towns, and parts of counties and towns along the line of said road are to be issued and deposited with custodians in New York, to be held in trust by said custodians for the use of said contractor as the work progresses on said road: Therefore, resolved, That the county clerk of said county be authorized and instructed to issue said bonds to the amount of

$50,000, payable as follows: $18,000 in 1872, $16,000 in 1873, $16,000 in 1874, with coupons attached bearing interest at ten per cent. per annum, after the first of July, 1869, and payable at the 4th National Bank in the city of New York; said bonds to be signed by the chairman of said board and attested and sealed by said clerk.

"*Resolved*, That the county clerk be instructed to retain said bonds in his possession until the whole subscription of the different towns in said county, as well as those of the county, is made up and the bonds
76 are ready to be delivered at one and the same time, with the approval of the chairman of said road and Messrs. Black, Seely, Raymond, and Budd.

"*Resolved*, That said railroad company be required to give bond, binding themselves and their successors in office, to said county and to the towns of Oswego, Kendall, and Fox, in the penal sum of $200,000, conditional that the said railroad shall be completed by the first day of July, 1871, through town of Fox, village of Yorkville, and the village of Oswego, in said county; and that all bonds remaining in the hands of said custodian, which have not been drawn on the certificate of the engineer of said road, endorsed J. U. Austin, in the manner & form as required in the report of this board adopted April 27th, 1869, and amended this day, (and in case of the failure of said J. U. Austin to perform said duties, then George M. Hollenback shall act,) after 4 years from the 1st day of July, 1869, shall be delivered up to the respective authorities issuing the same; and that a statement of these conditions, signed by the respective authorities issuing said bonds and the
77 officers of said railroad company, shall be filed with said bonds in the hands of said custodian', Donaldson & Kent, New York.

"J. S. SEELY,
"J. McGRATH,
"*Com.*"

"Report accepted and adopted. Those voting aye are Messrs. Seely, Budd, McGrath, Raymond, & Black. Those voting nay are Messrs. Wheeler, Henderson, & Michell."

To the reading of which extracts from the records of said board of supervisors in evidence and to each of them the plaintiff objected. The defendant's counsel, being interrogated in that regard by the court, stated that he did not propose or expect to connect the plaintiff with those proceedings by any proof of actual or personal notice thereof to him, nor by proof of any notice, except so far as the records themselves are notice to all the world, and that said records are offered as evidence tending to prove that the action of the board in ordering the issue of said bonds was a departure from the purposes sanctioned by the election, that these bonds were issued merely as a donation to the railroad company to aid in the building of the railroad. Thereupon the court sustained plaintiff's objections, and ruled that said proceedings,
78 and each part thereof, did not bind or affect the plaintiff, and were inadmissible as evidence, and refused to permit the same to be read to the jury. To which decision and ruling of the court in excluding said transcript and refusing to allow the same to be read in evidence the defendant, by its attorney, excepted when the said decision was made, and his exception was then & there allowed.

Thereupon defendant presented to said witness another written document, which purported to be a copy of the petition for said election mentioned in said bonds, & also a copy of the notices for said election, &

also a copy of an abstract of the votes given at said election, & also a copy of a contract or statement of May 4th, 1869, signed by David Shorts, chairman of the board of supervisors of Kendall County, & by the president of the railroad co., & by certain trustees, relating to the issue of said bonds; & the witness testified that these are true copy of the original petition on file in his office, & a true copy of the original draft of the notices, & of the notices posted for said election, & a true copy of a contract or statement made at the time of the issue of
79 the bonds, the original of which was filed in his office & still remains there. And, further, that there are no other papers on file in his office having any relation to the subject of the relations of Kendall County to these bonds or this issue.

Said petition offered in evidence was as follows:

To Jeremiah Evart', clerk of the county court of Kendall County, State of Illinois:

"We, the undersigned, legal voters of said county, most respectfully petition you to call a special election, to be held at the usual place of holding elections in said county, on a day to be fixed by you, for the purpose of determining whether said county shall subscribe fifty thousand dollars to the capital stock of the Ottawa, Oswego & Fox River Valley Railroad, and to issue bonds for that amount therefor, to aid in building said railroad, in accordance with the provisions of an act of the legislature of said State, entitled An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads, approved February 18th, 1857; provided, that
80 the vote be taken upon the express condition that no bond issue, pass, or be delivered to the trustees authorized by said railroad company to receive the same, until satisfactory assurance be given to the board of supervisors of said county, or a majority of them, that the road will be built.

(Subscribed by Robert Hopkins & fifty others.)

The copy of said notice is in these words:

Special election.

Whereas a petition in writing, signed by over fifty voters of the county of Kendall, State of Illinois, has been filed in my office, which petition is in the words & figures following, to wit:

"To Jeremiah Evarts, esq., clerk of the county court of Kendall County, State of Illinois:

"We, the undersigned, legal voters of said county, most respectfully petition you to call a special election, to be held at the usual places of holding elections in said county, on a day to be fixed by you, for the purpose of determining whether said county shall subscribe fifty thousand dollars to the capital stock of the Ottawa, Oswego & Fox River Valley Railroad, & to issue bonds for that amount therefor, to aid in building said railroad, in accordance with the provisions of an act of the legislature of said State, entitled 'An act authorizing certain
81 cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroad bonds,' approved February 18th, 1857; provided, that the vote be taken upon the express condition that no bonds issue, pass, or be delivered to the trustees authorized by said

railroad company to receive the same until satisfactory assurance be given to the board of supervisors of said county, or a majority of them, that the road will be built."

Dated this 27th day of February, A. D. 1869, at , in the town of , county of Kendall, and election will be held for the purpose of determining by vote whether said county of Kendall shall subscribe fifty thousand dollars to the capital stock of the Ottawa, Oswego & Fox River Valley Railroad, and issue bonds for that amount to aid in building said railroad, in pursuance of the act & according to the terms named in said petition.

The vote will be "for subscription" or "against subscription." Which election will be open at 8 o'clock in the morning and will continue open until six o'clock in the afternoon of the same day. Given under my hand at Yorkville, the 8th day of March, A. D. 1869.

JEREMIAH EVARTS,
County Clerk.

82 The copy of the said abstract of votes given at said election was as follows:

Abstract of votes given in the county of Kendall, and State of Illinois, at an election held in said county on Tuesday, the 30th day of March, A. D. 1869, one thousand and seventy-four votes were polled in favor of said county of Kendall subscribing fifty thousand dollars to the capital stock of the Ottawa, Oswego & Fox River Valley Railroad, and eight hundred and five votes were polled against said subscription.

We, the undersigned, justices of the peace of the county above named, were this day taken to the assistance of the clerk of the county court of said county, and the poll-books for the aforesaid election were opened, and the foregoing abstract made in our presence at the clerk's office, at the court-house in said county, this 8th day of April, A. D. 1869.

DANIEL HAIGH, J. P. [SEAL.]
H. S. HUDSON, J. P. [SEAL.]

STATE OF ILLINOIS, *Kendall County, ss:*

OFFICE OF COUNTY CLERK,
Yorkville, Ills., 8th April, 1869.

I, Jeremiah Evarts, clerk of the county court within and for the county aforesaid, do certify that the foregoing is a correct state-
83 ment of the votes cast for the object set forth at an election held in the different towns in the county of Kendall, in said State, on Tuesday, the 30th day of March, A. D. 1869.

In testimony whereof I hereto set my hand and affix the seal of said court, at my office in Yorkville, in said county, this 8th day of April, A. D. 1869.

JEREMIAH EVARTS,
Clerk of the County Court.

I certify that the within is a copy of the abstract of an election held in Kendall County on the 30th day of March, A. D. 1869, to determine whether the county would subscribe $50,000.00 to the capital stock of the Ottawa, Oswego & Fox River Valley Railroad, and on file in my office.

Witness my hand and official seal at Yorkville this 23d day of May, 1874.

JEREMIAH EVARTS,
County Clerk.

The copy of said statement or contract of May 4th, 1869, was as follows, viz:

To J. J. Donaldson, esqr., and Henry A. Kent, esqr., of the city of New York:

GENTLEMEN: The undersigned, David H. Shorts, chairman of
84 supervisors of Kendall County, in the State of Illinois, and W. Bushnell, pres., and D. F. Cameron, secretary of the Ottawa, Oswego and Fox River Valley Railroad Company, enclose to you herewith fifty bonds of the said county of Kendall, of the denomination of one thousand dollars each, bearing date May 4th, 1869, and due as follows: $18,000, due July 1, 1872; $16,000, due July 1, 1873; $16,000, due July 1, 1874, with coupons attached for interest at 10 per cent. per annum, payable on the 1st day of July of each year.

These bonds have been voted in aid of the building of the Ottawa, Oswego and Fox River Valley Railroad, and they are deposited with you as trustees in accordance with a contract entered into between the said railroad company and Oliver Young for building said railroad, and they are to be delivered by you to said Young, contractor, as the work of grading, building, and tieing said railroad shall progress, to be drawn on the written orders of said contractor and of the president and secretary of said railroad company, and upon the written monthly estimate of the engineer in charge of said railroad of the amount of work
85 done upon and of materials furnished for said railroad in said county of Kendall, which estimate is to be approved by J. A. Austin, or, in case of the failure of the said Austin to act, the approval of the estimates of the engineer are to be made by Geo. M. Hallenback, esqr.

You are further instructed that in case any of the bonds herein described shall remain unexpended according to the stipulation above named on the 1st day of July, 1873, the bond' so remaining, if any, are to be returned by you to the said county of Kendall. These instructions are forwarded in triplicate, and you are respectfully requested to sign two copies hereof in acceptance of this trust, and to transmit by express to Jeremiah Evarts, clerk, Yorkville, Kendall County, Illinois, one copy, and to D. F. Cameron, secretary, Ottawa, Illinois, one copy by mail.

May 4th, 1869.

DAVID H. SHORTS,
Chairman Board of Supervisors of Kendall County.
W. BUSHNELL, *President.*
D. F. CAMERON, *Secretary.*

Defendant then offered to read in evidence each of these papers—to the reading of each of which plaintiff by his counsel objected;
86 and the court sustained said objection of plaintiff to the reading of each of said papers, and excluded said papers and each of them from being read to the jury, for the reason that the defendant did not propose to connect the plaintiff with them or any of them in any way, to which ruling of the court in refusing to allow defendant to read said papers or any of them to the jury the defendant then and there excepted, and the exception was allowed.

After offering to read the last-named papers, and before the decision of the court as to the competency thereof, the defendant, by its counsel, stated that these papers were offered for two purposes, as tending to show that these bonds were issued as a donation and not in payment of

a stock subscription, and 2d, to show that the proceedings did not purport to be had under the general law of 1849.

Defendant's counsel here stated he did not expect to follow this with proof of notice to plaintiff other than what the law will imply from the proof offered.

The witness then testified that he, as clerk of the county court of Kendall, now has the custody of the election returns of the last general
87 election in Kendall County held next preceding March 30th, 1869, and defendant then asked the witness—

What number of votes were cast at that general election.

Plaintiff objected, & insisted this question should not be answered, insisting that the matter sought was immaterial & irrelevant.

Defendant stated the object was to show by this witness, in connection with the proofs already offered and other proofs to be offered, that the voters who voted "for subscription" at the election of March 30th, 1869, were less than half the number of voters of Kendall County, taking as a standard the number of voters who voted at the then last preceding general election in said county, and that defendant expected to prove that there were cast at that general election 2,490 votes, & follow it with proof that the votes cast "for subscription" in said county at the election of March 30th, 1869, were less than half that number; and that all this was offered to exclude every presumption which might arise that these bonds might have been issued under the general law. But the court sustained the said objection of plaint-
88 iff, & refused to permit the witness to answer said question.

To which ruling of the court in excluding said testimony defendant then & there excepted, & and the court allowed said exception.

Defendant then offered to prove by said witness that none of the notices for said election of March 30th, 1869, were issued, or posted, or published until on or after the 8th day of March, 1869.

To this the plaintiff objected, and the court sustained the objection, for the reason already stated, and refused to allow this testimony to be given to the jury, & and the defendant then & there excepted to said decision, and the exception was allowed.

Defendant's attorney then asked the witness Evarts to state what representations, if any, he heard the officers, or any of them (of the Ottawa, Oswego and Fox River Valley Railroad Company) make to the people of Kendall County, shortly before this election of March 30th, 1869, tending to induce them to vote "for subscription" at said election.

To this question plaintiff, by his counsel, did object, and the court asked the counsel for the defendant to state what he proposed to
89 prove, and thereupon defendant, by its counsel, stated to the court that it proposed to prove that the officers of this railroad company, who procured the issue of these bonds, came into Kendall County after the notices for the election were published, and before the election was held, and represented to the voters of said county that the said railroad company owned, had fully paid for, and had already running and in operation, & fully paid for, sixteen miles of their railroad at the south end thereof, being from Winona to Streator; that they had the means, with a little additional aid from the counties and towns along their line, to carry their road through and finish it to Geneva, on the Chicago and North Western Railroad, when, in point of fact, at that time, the railroad company had made a sale of that southern sixteen miles of their road, (which was all that was built,) to the Chicago and Alton Railroad Company, and did not own it at all, and have never owned it since.

Defendant proposes further to prove that these officers of the railroad company in question, upon the same occasion, further represented that said company would construct its road and operate it so that it
90 would compete as a rival with the C. B. & Q. R. R. Co. & be connected with the Illinois Central at Winona at the south, and with the C. & N. W. Railroad at Geneva at the north, so as to make a through line from below to Chicago, and by its competition reduce freights upon the C. B. & Q. Railroad, which ran through that county, & to Chicago, & to follow this with proof that both these representations were falsely & fraudulently made and were then known by said officers of the railroad company to be false; that in fact before the railroad was built this company leased its entire road to the C. B. & Q. R. R. Co. in perpetuity, on such terms that the said road does not and never can bring a single cent to the stockholders, & that said road has ever since been operated by the C. B. & Q. R. R. Co., & that in fact at the time of said representations an arrangement had already been made to thus put the road into the hands of the C. B. & Q. Company, and that the voters of Kendall County & its officers relied upon said representations as true, and that by reason of the truth, as it turned out, the stock of the company became worthless, when, had the representations been true, the stock would have been of great value, and the people of the county
91 would have derived great benefit in their business.

The court asked counsel for defendant whether he proposed to prove notice to plaintiff of the alleged facts offered in defence, and defendant said he did not expect to prove actual notice thereof to plaintiff.

The court thereupon decided that said proposed proofs were not admissible against the plaintiff, and refused to allow said question to be answered by said witness.

To which ruling of the court defendant excepted at the time of the making thereof, and the exception was then and there allowed.

Defendant then produced in court two printed volumes, one volume purporting to be the printed "Journal of the house of representatives of the twentieth general assembly of the State of Illinois, at their regular session begun and held at Springfield, January 5th, 1857," and the other volume purporting to be the printed "Journal of the senate of the twentieth general assembly of the State of Illinois, at their regular session begun and held at Springfield, January 5th, 1857." It was here admitted by plaintiff that those volumes are the volumes printed
92 in 1857, in pursuance of the statute then in force at that time, by the authority and under the direction of the secretary of state of Illinois, as "the journal" of said house of representatives for that session, and as "the journal" of said senate for that session; but he does not admit, but denies, that they are correct copies of the original journals.

Defendant's counsel then read to the court, in the presence of a witness called and sworn in behalf of defense, (named Andrew Linch,) the following extracts from said printed journals, that is to say:

An extract from said house journal from the proceedings of the house of representatives (on page 304) had on the 27th day of January, 1857, the following:

"Mr. Crothers introduced a bill for an act authorizing certain cities, counties, incorporated towns, or townships to subscribe to the stock of certain railroads; which was read a first time and ordered to a second reading.

"On motion of Mr. Crothers the rule was suspended, the bill read a

second time by its title, and referred to the committee on internal improvements."

Also, an extract from the proceedings of the house (on page 487) had on the 4th day of February, 1857, the following:

93 "Mr. Sparks (from the same committee, to which was referred a house bill for 'An act to authorize certain cities, counties, incorporated towns, or townships to subscribe to the stock of certain railroads') reported the same back without amendment, and recommended its passage.

"Ordered to a third reading."

Also, an extract from the proceedings of the house (page 825) had on the 14th day of February, 1857, as follows:

"House bill for 'An act authorizing certain cities, counties, incorporated towns, or townships to subscribe to the stock of certain railroads,' was taken up, read a third time; and the question being, Shall the bill pass? it was decided in the affirmative—yeas 54, nays 00. Those voting in the affirmative are:"

(Here follows the names of 54 members.)

"Ordered that the title of the bill be as aforesaid, and that the clerk inform the senate thereof and ask their concurrence therein."

Also, the following extract from (page 949) *from* the proceedings of said house on the 17th day of February, 1857, appearing on the face of said house journal among the first proceedings had on that day at the afternoon session, begun at two o'clock p. m. of that day.

94 "A message from the senate, by Mr. Wyatt, assistant secretary:

"Mr. SPEAKER: I am directed to inform the house of representatives that the senate have concurred with them in the passage of bills of the following titles, viz:"

* * * * * * *

"A bill for an act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads."

* * * * * * *

Also, an extract from the said printed journal (on page 965) of the proceedings of said house on the 17th day of February, 1857, as follows:

"Mr. Gondy, from the committee on engrossed and enrolled bills, reported as correctly enrolled bills of the following titles, viz:"

* * * * * * *

"An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads." * * *

Also, an extract (from pages 983 & 984) of proceedings of said house on the 18th day of February, 1857, as follows:

"A message from the governor, by Benjamin F. Johnson, private secretary:

95 "Mr. SPEAKER: I am directed by the governor to inform the house of representatives that he has approved and signed bills of the following titles, to wit: * * * "An act authorizing certain cities, counties, incorporated towns, & townships to subscribe to the stock of certain railroads." * * * * *

Also, an extract from said house printed journal (on page 1024) of proceedings had on the 19th day of February, 1857, as follows, viz:

"Seven o'clock a. m., the hour fixed for adjournment of the two houses, having arrived, the speaker declared the house adjourned sine die."

Also, an extract from said printed journal of the senate (on page 629)

of proceedings had senate on the 14th day of February, 1857, as follows:

"A message from the house of representatives, by Mr. Boal, a member:

"Mr. PRESIDENT: I am directed to inform the senate that the house of representatives have passed bills of the following titles, viz:"

* * * * * * *

"A bill for an act authorizing certain cities, counties, incorporated towns, or townships to subscribe to the stock of certain railroads."

* * * * * * *

96 Also, another extract from the said printed journal (on page 272) of proceedings of the senate, had under date of the 16th day of February, and at an evening session of the senate had on that day, which evening session begun at 7 o'clock p. m. of that day, as follows, viz:

"House bill for 'An act authorising certain cities, counties, and incorporated towns to subscribe to the stock of certain railroads' coming up, was read a first time and ordered to a second reading. On motion of Mr. Fuller the rule was suspended, the bill read a second time by its title, and referred to the committee on banks and corporations."

Also, another extract from said printed journal of the senate (on page 789) of proceedings of the senate, had on the 19th day of February, 1857, as follows, viz:

"The hour for adjournment having arrived, the lieutenant-governor declared the senate adjourned sine die."

Said witness, Andrew Linch, being then examined, testified that he had carefully read over said printed journal of the house of repre-
97 sentatives & said printed journal of the senate carefully, and that positively there is no entry in either of said journals other than the extracts above stated which has any relation to any action of either the house or the senate in reference to the passage of the said bill, or any other bill of the title in question, or relating to that subject; that he had read both of these printed journals all through, and besides he had read the journal in the secretary of state's office.

Defendant's attorney then offered to read in evidence to the jury the foregoing extract from said printed journals, stating to the court that these printed journals are offered in connection with the testimony of the witness Andrew Lynch for two purposes, for the purpose of showing all the proceedings which were had in both houses of the legislature in relation to the passage of the supposed statute entitled "An act authorising certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads, being the same supposed statute referred to in the recitals in these bonds read in evidence by plaintiff, & that he proposes to follow these extracts, if admitted,
98 by proof that no proceedings other than those stated in these extracts are recorded in either of those printed journals relating to the supposed statute, and this for the purpose of showing that said bill for said act never passed the said senate, & that no vote was ever taken in said senate on the question, Shall the bill pass? or the ayes and nays taken and entered on such a vote, and consequently the supposed act never became a valid statute; and these printed journals are also offered for the purpose of showing notice to all the world that said bill for said act never did pass the senate, and was therefore never a valid statute.

To which evidence so offered to be given to the jury the plaintiff objected, stating two grounds: 1st. That said printed statutes are not, as he insists, competent evidence to prove that proceedings were had

by the legislature; & second, that the plaintiff's rights as the holder of these bonds for value cannot be assailed by proving that said bill never passed the senate, & that plaintiff had a right to rely upon the printed published statute, and was not bound to look further.

99 NOTE BY THE COURT.

[It appeared that the bill which the defendant alleged had never become a law was duly signed by the speaker of the house of representatives & the president of the senate, and attested under the signature of each as having passed the respective houses, and was duly approved by the governor & enrolled, and was published as a law among the other laws of the State, under the official sanction of the secretary of state. And it appeared further that the legislature of the State had, by two acts approved by the governor, the authenticity of which was not questioned, amended the act of the legislature referred to, viz, an amendment of March 27, 1869, and an amendment of April 20, 1869. Under these circumstances the court was of the opinion that the defendant could not, as against the plaintiff in this case, show that there was some omission in the journal of the senate from whatsoever cause to state that the act objected to passed the senate by ayes & nays, and therefore that the evidence sought to be introduced for the purpose stated was inadmissible. To which opinion of the court the de-
100 fendant then & there excepted. It may be proper also to state that after the defendant had finished his evidence the plaintiff offered to prove that the journals, extracts from which are stated above, were not the original journals, or copies from the original journals, but the court, for the reason stated, considered it unnecessary to make such proof.]

Defendant, by its counsel, then produced to the court a certified transcript from the journals of the said twentieth general assembly, which certified transcript and certificate bore date December 6th, 1872, and was authenticated by the signature of Edward Rummel, then secretary of state, and also by the great seal of state, and was & is as follows:

UNITED STATES OF AMERICA,
State of Illinois, ss:

I, Edward Rummell, secretary of state of the State of Illinois, do hereby certify that I am custodian of the original journals of proceedings of the senate and house of representatives of the twentieth general assembly of said State, at their regular session begun and held at the city of Springfield, January 5th, A. D. 1857. That said journals
101 now remain in my office, and that upon examination of the same I find the following proceedings in relation to an "act authorizing certain cities, counties, incorporated towns, or townships to subscribe to the stock of certain railroads, to wit:

"In the house of representatives on the 27th day of January, 1857,

"Mr. Crothers introduced a bill for an act authorizing certain cities, counties, incorporated towns, or townships to subscribe to the stock of certain railroads, which was read a first time, and ordered to a second reading.

"On motion of Mr. Crother the rule was suspended, the bill read a second time by its title, and referred to the committee on internal improvements."

And afterwards, to wit, on the fourth day of February, 1857, in said

house of representatives the following proceedings appear and are entered upon the said house journal, to wit:

"Mr. Sparks, from the same committee, to which was referred house bill for 'An act to authorize certain cities, counties, incorporated towns, or townships to subscribe to the stock of certain railroads,' re-
102 ported the same back without amendment and recommended its passage.

"Ordered to a third reading."

And afterwards, to wit, on the 14th day of February, 1857, the following proceedings of said house of representatives were had, as appears from and are entered upon said house journal, to wit:

"House bill for 'An act authorizing certain cities, counties, incorporated towns, or townships to subscribe to the stock of certain railroads' was taken up, read a third time, and the question being, Shall the bill pass? it was decided in the affirmative—yeas 54, nays 00.

"Those voting in the affirmative are Messrs. Arnold, Bane, Blades, Boal, Burbank, Burke, Casey, Christy, Church, Connely, Crothers, Callom, Davis of Vermillion, Devine, Dougherty, Dyckes, Essler, Evine, Eustace, Frisbie, Gilbert, Gorin, Jarrolt, Jones, Kelsey, Kerley, Lothrop, Laurence, Little, Pinckney, Reading, Skellenberger, Sloane,
103 Smith, Stepp, Trail, Goudy, Gregory, Grimes, Hitt, Huitt, Ingersoll, Logan, Mason., Megredy, Morgan, Morris, Parker, Tyner, Watt, Wheeler, Wilkins, Wyche, Mr. Speaker.

"Ordered, that the title be as aforesaid, and that the clerk informs the senate thereof and ask their concurrence therein."

And afterwards, to wit, on the 14th day of February, A. D. 1857, the following proceedings were had in the senate of the said State of Illinois, and entered on the senate journal, to wit:

"A message from the house of representatives by Mr. Boal, a member:

"Mr. PRESIDENT: I am directed to inform the senate that the house of representatives have passed bills of the following title, viz: 'A bill for an act authorizing certain cities, counties, incorporated towns, or townships to subscribe to the stock of certain railroads.'"

And afterwards, to wit, on the 16th day of February, A. D. 1857, the following proceedings were had in the said senate of Illinois, and entered upon the journal of said senate, to wit:

104 "House bill for an act authorizing certain cities, counties, incorporated towns, or townships to subscribe to the stock of certain railroads, coming up, was read a first time and ordered to a second reading. On motion of Mr. Fuller, the rule was suspended, the bill read a second time by its title, and referred to the committee on banks & corporations."

And afterwards, to wit, on the 17th day of February, A. D. 1857, in the house of representatives of said State of Illinois, the following proceedings were had and entered in the journal of said house of representatives, to wit:

"Mr. Goudy, from the committee on engrossed and enrolled bills, reported as correctly enrolled bills of the following titles, viz:

* * * * * * *

"An act authorizing certain cities, counties, incorporated towns, or townships to subscribe to the stock of certain railroads."

And afterwards, to wit, on the 18th day of February, A. D. 1857, in said house of representatives, the following proceedings were had and entered in the journal of said house of representatives, to wit:

105 "A message from the governor by Benjamin F. Johnson, private secretary:

"Mr. SPEAKER: I am directed by the governor to inform the house of representatives that he has approved and signed bills of the following titles, to wit:" * * * * * *

"An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads."

Which are all the entries had in regard to said bill for said act entered upon said journals or either of them.

And I further certify that it does not appear from said senate journal that said bill for an act authorizing certain cities, counties, incorporated towns, or townships to subscribe to the stock of certain railroads was read on three different days in said senate, nor does it appear from said senate journal that the rule requiring the same was suspended in said senate, nor does it appear from said senate journal that on the final passage of said bill in said senate the ayes or noes were entered in said senate journal, nor does it appear from either of said journals that a majority of all the members of both houses concurred in the passage of said bill.

106 In testimony whereof I have hereunto set my hand & affixed the great seal of state. Done at the city of Springfield this 6th day of December, in the year of our Lord eighteen hundred and seventy-two, and of the Independence of the United States the ninety-seventh.

[SEAL OF STATE.] EDWARD RUMMEL,
Secretary of State.

And defendant's counsel then offered to read the said transcript from said legislative journals so authenticated in evidence to the jury, in connection with the aforesaid testimony of the said witness, Andrew Linch, and in connection with the extracts aforesaid from said printed journals.

To the reading of which transcript, so authenticated by the great seal of state and the signature of the said secretary of state, in evidence, the plaintiff, by his counsel, objected. And the court, for the reasons heretofore mentioned, sustained the said objection, and refused to permit the defendant to read the same in evidence, to which ruling
107 of the court in refusing to permit said evidence so offered to go to the jury, the defendant excepted when said decision was made, and the court allowed said exception; and the defendant then and there asked that this bill of exceptions should be signed, sealed, and made a part of the record in said case, which is done.

THOMAS DRUMMOND. [SEAL.]

(Endorsed:) Filed May 29th, 1874. Wm. H. Bradley, clerk.

And afterwards, to wit, on the 16th day of July, A. D. 1874, said defendant filed his bond, in said entitled cause in the said clerk's office, which said bond is in the words and figures following, to wit:

Supersedeas bond.

Know all men by these presents that we, the county of Kendall, as principal, and Henry D. Farley and C. H. Raymond, of said county, as sureties, are held and firmly bound unto Augustus M. Post in the full and just sum of twenty thousand dollars, ($20,000,) to be paid to the said Augustus M. Post, certain attorney, executors, administrators,
108 or assigns, to which payment, well and truly to be made, we bind ourselves, our successors, our heirs, executors, and administrators jointly and severally by these presents. Sealed with our seals and dated this thirteenth day of July, in the year of our Lord one thousand eight hundred and seventy-four, (1874.)

Whereas, lately, at a term of the circuit court of the United States

in & for the northern district of Illinois, held at Chicago, in a suit depending in said court between Augustus M. Post as plaintiff & the board of supervisors of Kendall County as defendants, a judgment was rendered against the said defendants; and the said the board of supervisors of Kendall County, (defendants aforesaid,) having prayed for a writ of error to review said proceedings in the Supreme Court of the United States, and having obtained writ of error and filed a copy thereof in the clerk's office of the said court, to revise the judgment in the aforesaid suit, and a citation, directed to the said Augustus M. Post, citing and admonishing to be and appear at a Supreme Court of the United
109 States, to be holden at Washington the first Monday of December next.

Now, the condition of the above obligation is such that if the said the board of supervisors of Kendall County shall prosecute the said writ to effect, and answer all damages and costs, if said board fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

Sealed and delivered in presence of—

JEREMIAH EVARTS, [SEAL.]
Attorney in fact for Kendall County.
HENRY V. FARLEY. [SEAL.]
C. H. RAYMOND. [SEAL.]

"Resolved, that Jeremiah Evarts is hereby appointed agent of Kendall County, and authorized, for and in behalf of the county, to take all measures to take to the Supreme Court of the United States for review the suit now pending in the circuit court of the United States for
110 the northern district of Illinois, if judgment has or shall be against the county, and said agent is hereby authorized to execute any and all bonds which may be deemed advisable to effect that end, by appeal, writ of error, or otherwise.

"Carried."

I certify that the foregoing resolution was adopted by the board of supervisors of Kendall County, State of Illinois, on the 28th day of May, A. D. 1874, as appears from the records of my office.

Witness my hand and seal of the county court, at Yorkville, this 14th day of July, A. D. 1874.

[SEAL.] JEREMIAH EVARTS,
Clerk Co. Court, Kendall County.

STATE OF ILLINOIS, *Kendall County, ss:*

A. D. Newton, sheriff of said county, being duly sworn, does depose and say that he is acquainted with the pecuniary circumstances of Henry W. Farley and C. H. Raymond, whose names are attached to the bond hereto; that the signatures are genuine, and that they have
111 real estate and personal property in their own right worth twenty thousand dollars or more, to the best of his information and belief.

A. D. NEWTON.

Sworn to and subscribed before me this 14th day of July, A. D. 1874.

[SEAL.] JEREMIAH EVARTS,
Co. Clerk.

Approved.

THOMAS DRUMMOND.

(Endorsed:) Filed July 16th, 1874. Wm. H. Bradley, clerk.

112 NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true, correct, and complete transcript of the record of all the proceedings had in said court in said entitled cause, wherein Augustus T. Post is plaintiff and said board of supervisors of Kendall County is defendant, as appears from the records of said court remaining in my custody.

In testimony whereof I have hereunto set my hand and affixed the seal of said circuit court, at my office, in Chicago, in said district, this eighteenth day of August, A. D. eighteen hundred and seventy-four, and of our Independence the ninety-ninth year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

113 UNITED STATES OF AMERICA, *ss:*

The [President of the United] States of America to the honorable the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said circuit court, before you, between Augustus T. Post plaintiff, and the Board of Supervisors of Kendall County, defendant, a manifest error hath happened, to the great damage of the said the board of supervisors of Kendall County, as
114 by its complaint appears. We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and custom of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the 29th day of May, in the year of our Lord one thousand eight hundred and seventy-four, and of our Independence the ninety-eighth year.

[SEAL.] WM. H. BRADLEY,
Clerk of Circuit Court of the United States
for the Northern District of Illinois.

(Indorsed:) Circuit court of the United States for the northern dist. of Illinois. Augustus T. Post vs. Board of Supervisors of Kendall County. Writ of error.

(Indorsement on cover:) No. 507. The Board of Supervisors of Kendall County, plaintiff in error, vs. Augustus T. Post. N. Illinois, C. C. U. S. Filed 19th September, 1874.

SUPREME COURT OF THE UNITED STATES.

No. 255.

THE BOARD OF SUPERVISORS OF KENDALL COUNTY, PLAINTIFF IN ERROR,

vs.

AUGUSTUS T. POST.

STIPULATION OF COUNSEL AND ADDITION TO RECORD.

[Filed December 23, 1875.]

1 United States circuit court, northern district of Illinois.

FRIDAY, *May* 29, *A. D.* 1874.

Present, Hon. Thomas Drummond, judge.

AUGUSTUS T. POST
vs.
THE BOARD OF SUPERVISORS, OF KENDALL County. } Debt.

Now come the parties, by their attorneys, and, upon issue joined, hereupon come a jury of good and lawful men, to wit, H. McClary, W. Haven, G. Scammonds, F. Crow, W. Campbell, S. Hyman, J. Bennett, A. H. Palmer, Charles Miller, C. Roberts, J. M. Lomis, and C. Davis, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing the evidence and the arguments of counsel, and receiving the instructions of the court, the jury returned into court
2 the following verdict, to wit: We, the jury, find the issue for the plaintiff, and find his debt in the sum of thirteen thousand dollars, and assess his damages for the detention of said debt to the sum of eleven hundred and eighty-eight dollars and five cents; and thereupon the defendant, by its attorney, moves the court for a new trial herein; and the court, being now fully advised thereon, overrules the same.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of thirteen thousand

dollars, his debt, and the said sum of eleven hundred and eighty-eight dollars and five cents, his damages, making in all the sum of fourteen thousand one hundred and eighty-eight dollars and five cents for debt and damages, together with his costs and charges in this behalf expended, amounting to the sum of one hundred and thirty-eight
3 dollars and fifty-five cents.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

I, William H. Bradley, clerk of the circuit court of the United States for said northern district of Illinois, do hereby certify the above and foregoing to be a true and correct copy of the judgment entered of record in said court on the 29th day of May, A. D. 1874, in the cause wherein Augustus T. Post is the plaintiff and the Board of Supervisors of Kendall County is the defendant, as the same appears from the original thereof, now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court at my office in Chicago, in said district, this 25th day of November, A. D. 1875.

[SEAL.] WM. H. BRADLEY, *Clerk.*

4 It is agreed by the parties, through their attorn*ies*, that the foregoing shall be filed as an amendment of the record in the case of The Supervisors of Kendall County vs. Augustus T. Post, now pending in Supreme Court of the U. S.

T. LYLE DICKEY,
For Plaintiff in Error.
D. T. LITTLER,
Attys. for A. Post.

O

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1875.

THE BOARD OF SUPERVISORS OF KENDALL COUNTY, Plaintiff in Error,
—vs.—
AUGUSTUS T. POST, Defendant in Error.

No. 255.

Error to the Northern District of Illinois.

Brief and Authorities

FOR PLAINTIFF IN ERROR.

—BY—

T. LYLE DICKEY.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.
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1876.

Statement of what the Record shows.

This was an action of debt brought by Post against Kendall County. The declaration had special counts, on thirteen coupon bonds, each for $1,000, payable July 1st, 1872. The bonds, as shown in the pleadings and produced at trial, each bear date *May 4th*, 1869, and purport to be the bonds of Kendall County, and are signed by the chairman of the Board of Supervisors, and attested by the County Clerk and the county seal, and are payable on their face to the Ottawa, Oswego and Fox River Railroad Company or bearer, and they each contain the following recital:

"This bond is one of a series of 50 bonds, bearing even "date herewith, each for the sum of $1,000," * * * "and is issued in pursuance of an election held in said "county on *the 30th day of March*, 1869, under and by "virtue of a certain act of the Legislature of the State of "Illinois, approved Feb. 18, 1857, entitled, 'An act *author-*"'*izing* certain cities, counties, incorporated towns and "'townships to subscribe to the stock of certain railroads,'" * * * "at which election a majority of the legal voters "*participating in the same* voted 'for subscription' to the "capital stock of said railroad in the sum of fifty thousand "dollars, and to issue the bonds of said county therefor; "and the said election was by the proper authorities duly "declared carried 'for subscription,' previous application "having been made to the clerk of the county court of "said county, and said clerk having called said election in "accordance therewith, and having given due notice of "the time and place of holding the same, as required by "law and *the act aforesaid*."

There was also a common count.

The county pleaded *non est factum* to each special count, which plea was supported by affidavit, and thus put in issue the execution of the bonds *by the county*.

A plea of "*special traverse*" was also interposed to each of these special counts, alleging that the supposed act of February 18, 1857, never was or became a valid law of the State, in this: that no bill for said act, nor the act itself, was ever in any manner passed *by the Senate*. The plea sets out in detail all the proceedings of both houses in relation to the bill for said act, and says there were none other, and concludes with the special traverse or *absque hoc*.

To this plea Post demurred, and the court below sustained the demurrer. (Page 66).

To the common count there was a plea of *nil debet*.

Issue was joined upon the plea of *non est factum* and upon the plea of *nil debet*, and these issues were tried by a jury, and the verdict was for plaintiff; and judgment upon the verdict for $13,000 debt and $1,188.05 damages and for costs. (See pages 67 and 68, and the amended transcript).

THE BILL OF EXCEPTIONS

shows that on the trial, after plaintiff had read the bonds in evidence, (the genuineness of the signatures being admitted), defendant offered to prove, by the records and proper documentary evidence, that the bonds in question were issued *as a donation* to the railroad company, and contributed towards payment for work done in building the road, and *not in payment for stock* subscribed for by the county, and that no subscription for stock was ever made by the corporate authorities of the county;

And that at the supposed election on the 30th of March, 1869, the votes cast for subscription were less in number

than one-half of the legal voters then residing in the county, (86 to 88);

And that no notices for said election were given until after *the 8th of March*, 1869;

And that, after the posting of notices and before the election, the railroad company, through its officers, willfully and knowingly made false and fraudulent representations to the voters who did vote for subscription; and that such representations (which are set out) were material, and were relied upon by such voters; and that such voters were thus fraudulently induced to vote "for subscription." (89 to).

Defendant below also offered to prove, by the printed journals of each house of the Legislature, (for that session of the same), printed in pursuance of the constitution and laws, under the supervision of the Secretary of State; and also by the oral testimony of a witness (who had read said journals carefully and throughout) that there was no entry in the same of any passage by the Senate of said supposed act of February 18, 1857, mentioned in the recitals of said bonds, (92 and 98), and also offered to prove the same fact by the production of a certified transcript from the record of the journals in the office of the Secretary of State, under the seal of the State. (100 to 106).

Each part of this evidence, so offered, was excluded by the court, and to each ruling defendant below did then and there except, and his exceptions were allowed. (77, 86, 88, 91, 100 and 107).

THE STATUTE UNDER WHICH THE BONDS WERE ISSUED.

The supposed statute, mentioned in the recitals in said bonds, is found on page 225 of Session Laws of Illinois of 1857. This supposed statute is entitled, "An act *authorizing* "certain cities, counties, incorporated towns and townships

" to subscribe to the stock of certain railroads," and purports to provide, among other things, that any county or township near the route of the railroad, as then or thereafter located, may become subscribers to the stock of this road, and may issue coupon bonds for the amount of such stock so subscribed, * * * the proposition for said subscription having been first submitted as hereinafter provided, to the inhabitants of such county or township, and *approved by them*, and that on the application of 50 voters of such county or township, specifying the amount to be subscribed, it shall be the duty of such clerk to call an election, *in the same manner* that *other elections* for said county or township are called, for the purpose of determining whether such county or township will subscribe to the stock of said road, and if a majority of said votes shall be " for subscription," then the board of supervisors of such county, or the supervisor and town clerk of such township so voting, shall cause such subscription to be made, and upon its acceptance by the railroad company, shall cause bonds to be issued in conformity with said vote, which bonds * * * shall not be of less denomination than $1,000.

(This supposed statute, as we insist, was and is void, never having been passed by the Senate.)

THE CONSTITUTION.

" Sec. 1, Art. 3. The legislative authority of the State " shall be vested in a General Assembly, which shall con- " sist of a senate and house of representatives."

" Sec. 3. Each house shall keep a journal of its pro- " ceedings, and *publish* them."

" Sec. 21. * * * On the *final passage* of *all bills*, " the *vote shall* be by ayes and noes, and *shall be entered* " on the journal; and *no bill* shall *become a law* without

" the concurrence of a majority of all the *members elect* in " *each* house."

" Sec. 26. * * * An accurate statement of the re- " ceipts and expenditures of public money shall be attached " to and published *with the laws* at the rising of each ses- " sion," &c.

" Sec. 39. The General Assembly shall provide by " law that * * * the copying, printing, binding and " distributing the *laws* and *journals* * * * shall be " let, &c." (R. Statutes of Illinois, 1874, pages 41 to 45.)

" Sec. 21, Art. 4. Every bill which shall have passed " the senate and house of representatives shall, *before it* " *becomes a law*, be presented to the governor ; if he ap- " prove he shall sign it, but if not, he shall return it with " his objections, to the house in which it originated ; and " the said house shall enter the objections at large upon " their journal, and proceed to reconsider it, * * * " but in all such cases the votes of both houses shall be " determined by yeas and nays, to be entered on the jour- " nal of each house respectively." (R. S. 1874, 47.)

Extracts from and Statement of Decisions of the Supreme Court of Illinois.

The case of *Spangler* v. *Jacoby*, 14 Ill., 298, was decided at June Term, 1853. The bill for the supposed act under consideration in that case passed the senate, was amended in the house, was sent back to the senate for the concurrence by the senate in the amendment. The senate concurred in the amendment, and passed the bill as amended, but so far as appeared upon *the journal* of the house, the bill was *not passed* by the house, by a vote of *ayes and noes*. The court held the supposed statute void.

After quoting the 13th section, art. 3, of the constitution, the Court say :

"A majority of all the members elect in each house "must concur on the final passage of a bill. Without it, "the act has *no more force than* the paper on which it is "written. The vote must be by ayes and noes. The "*constitution* prescribes this *as a test* by which to deter- "mine whether the requisite number of members vote in "the affirmative. The vote must also be entered *on the* "*journal*. * * * It must appear on the face of the "journal that the bill passed by a constitutional majority.

"When an act has gone through all the forms of legis- "lation, it is deposited in the office of the Secretary of "State. The journals of the two houses take the same "direction. *They all become records of his office*, and "may be certified as such under the seal of the State. "The printed statute book is evidence of the acts contained "therein. It is, however, not conclusive. * * * "It is competent to go behind a printed statute. * * * "It is clearly competent to show from the journals of "either branch of the legislature, that a particular act was "not passed in the mode prescribed by the constitution, "and thus defeat its operation.

"The constitution requires each house to keep a jour- "nal, and declares that certain facts, made essential to the "passage of a law, shall be stated therein. If these facts "are *not set forth*, the conclusion is, *they did not transpire*. "* * * The journal is *the evidence* of the action of the "house, and by it the act must stand or fall."

The following authorities are referred to in the opinion as supporting the reasoning :

State v. *McBride*, 4 Mo., 303.
Green v. *Graves*, 1 Doug., 351.
Purdy v. *People*, *&c.*, 2 Hill, 31, and 4 Hill, 14.

This construction of the constitution of 1848, thus given

by the Supreme Court of Illinois in the year 1853, was affirmed and reaffirmed :

In 1855, in the case of *Turley* v. *Logan*, 17 Ill., 153.
" 1857, " " *Prescott* v. *Canal Trustees*, 19 Ill., 326.
" 1860, " " *Schuyler* v. *People*, &c., 25 Ill., 182, 183.
" 1864, " " *Barnes* v. *Starne*, 35 Ill., 121.

Thus it is shown that before the year 1869, (the year of the issue of these bonds,) the Supreme Court had, in five different decisions, laid down as the true construction of the constitution of 1848, the rule that "to give validity to any statute passed under that constitution, it must appear affirmatively upon the journals of each house, that such statute, on its final passage in that house, received a vote of a majority of all the members elect of that house ; and that such vote, on its final passage, was by ayes and noes, and was so entered upon the journal."

In the case of *Barnes* v. *Starne*, 35 Ill., 121, decided in 1864, the whole question was reconsidered on very full argument, and the doctrine was *reaffirmed* without any qualification.

Since these bonds were issued, the question of their validity, and the validity of this supposed statute of February 18, 1857, (on which they depend,) has been twice before the Supreme Court of Illinois, and in both cases that Court has ruled that the supposed act never became a law, and that the bonds are void.

Ryan v. *Linch*, Legal News, vol. 6, p. 70, (Nov., 1873.)

Miller et al. v. *Goodwin et al.*, Manuscript Opinion, filed Jan. 30, 1875, Legal News, Vol. 7, page 294.

That this ruling was correct, we refer to the following authorities from other States:

State v. *Moffit*, 5 Ohio, 223.
Dissenting Opinion of Bronson J., in *People* v. *Purdy*, 3 Hill, 31.
Debow v. *People*, 1 Denio, 9.
Ferguson v. *Miners's Bank*, Smedes R., 609, (Tennessee.)
Southworth v. *P. and F. R. R.*, 2 Gibbs, (Mich.) 287.
Fowler v. *Pierce*, 2 Cal., 165.
35 N. H., 579.
45 N. H., 607.
American Law Reg., 1874, p. 248.
Thomas v. *Dakin*, 22 Wendell.
Eld v. *Gorham*, 20 Cowan, 9.
Green v. *Wilber*, 22 Miss., 687.
McBride v. *State*, 4 Missouri, 303.
McCullock v. *State*, 11th Ind., 524.
Gunn v. *Green*, 1 Douglass, 351.

Even if it be thought that this construction of the constitution of 1848—by the Supreme Court of Illinois—was and is erroneous, still these decisions became a part of the constitution—as an amendment thereof—and affected the same, in the same manner, as if written in, or added to the constitution in 1853, when the first decision of this question was made. Whatever may have been the constitutional law of Illinois, prior to 1853, the rule of law adopted on that subject by the Supreme Court of the State became and was the law of Illinois in 1853, and was so until after these bonds were made, and they are subject to that fundamental law, in the same manner as as if it had been written out on their face—and *in such case* this Supreme Court of the United States has *always* followed and upheld the law,

as ruled by the State Court. *Leffingwell* v. *Warren*, 2 Black., 599, and authorities there quoted, viz: 11 Wheaton, 351; 3 Peters, 270; 6 Peters, 291; 13 Pet., 45; 1 How., 767 and 812; 11 Howard, 297; 14 How., 504.

Nor is this rule qualified or invaded by the later decisions:

See *Walker* v. *Marks*, 17 Wall., 650.
Provident Institution v. *Mass.*, 6 Wallace, 630.
Randall v. *Bingham*, 7 Wall., 541.
Gut v. *State*, 9 Wall., 37.
Township of Pine v. *Talcott*, 19 Wall., 667.

In the last case given, this court says: "When the bonds "were issued, there had been no authoritative intimation, " * * that such statutes were invalid. * * The "National Constitution forbids States to pass laws impair- "ing the obligation of contracts. In cases properly "brought before us, *that end* can no more be unwar- "rantably accomplished, by *judicial decisions*, than by *leg- "islation*." Such decisions are placed on the same basis of authority as that on which *legislation* rests. Such decisions are the valid acts of the State, and unless forbidden by the Constitution of the United States, must be upheld. They enter into, form a part of, and validate or invalidate, as the case may be, every contract made in the State while they are in force.

This same doctrine is recognized and left intact in the cases of

Heymeyer v. *Iowa City*, 3 Wall., 294.
Guelpcke v. *Dubuque*, 1 Wall., 175.
Olcott v. *The Supervisors, etc.*, 16 Wall., 689 and 690.
Thompson v. *Lee Co.*, 3 Wall., 327.
Butts v. *Muscatine*, 8 Wall., 571.

And the subject is well discussed by Judge Dillon, in his excellent work on Municipal Corporations, 1st vol., sec. 416 and 416 *b*.

It is not necessary to adduce reasons or authority to this court to show that a county or township is not bound by such bonds, unless the officers making the bonds, in the name of the county, had authority by statute to so do in behalf of the county. That rule is too universal and too well settled; and must prevail, even against *bona fide* holders.

In this case the world had full notice. On the 4th of May, 1869, (when these bonds were issued,) *there* stood the constitution and the repeated decisions of the Supreme Court of the State—declaring that no supposed statute (although signed by the Speakers of both Houses, and approved by the Governor, and printed in the session laws) was valid unless it appeared upon the journal of the Senate, that the same had been passed by the Senate, upon a vote upon ayes and noes, entered in that journal; there stood the constitution—declaring that the journal must be *published* (Sec. 3, Art. 3); there stood the Senate journal (for the session of the Legislature at which the supposed statute professed to have passed), printed and published, in pursuance of law, under the direction of the Secretary of State—and in it was found no mention of the passage by the Senate of this statute; and there was the record of the journal in the office of the Secretary of State, kept in pursuance of law—and in it was found no mention of the passage of this supposed statute. All men had notice that this bill had not passed, and that the statute authority, mentioned on the face of the bonds, was a nullity.

II.

It is claimed, however, that the supposed statute of Feb. 18, 1857, though void for many years after it took its place on the statute book, was made valid on the 27th of March, 1869, by the passage of an act, found on page 329, Vol. 3, Private Laws 1869, entitled "An act to amend an "act, entitled 'An act to incorporate the Ottowa, Oswego "and Fox River Valley Railroad Company,'" as follows:

"Sec. 1. Be it enacted, etc., That the charter of the Ot-"tawa, Oswego and Fox River Valley Railroad Company "be, and the same is hereby, so amended as to authorize "said company to build its road, from the town of Wenona, "* * * to the city of Peoria."

"Sec. 2. That any city, county, town, or township, "near to or through which said road is now located, is "hereby authorized to subscribe to the stock of said rail-"road, upon the terms and conditions prescribed in an act "entitled 'an act to authorize certain cities, counties, "'towns and townships to subscribe to the stock of certain "'railroads,' *in force* Feb. 18, 1857."

1st. We say that this statute of March 27, 1869, does not give any validity to the supposed statute mentioned in the bonds, because it is evident that the Legislature did not intend to *put in force* a former statute. The words of the statute do not profess to enact *into life* an old void statute, and no such legal effect can properly be given to this statute unless there be something clearly indicating an intention on the part of the Legislature to do so. If, in this statute of March 27, 1869, reference was had at all to the act recited in the bonds, it is evident the Legislature inadvertently supposed the act of February, 18, 1857, was in fact in force as a law, and upon that hypothesis, the evident intention and *only office* of the second section of the act of March 27, 1869, was to place certain towns not

mentioned in the supposed act of February 18, 1857, on the same footing which certain towns named in the old act were supposed to occupy under the supposed old act. The old act being of no force, but void, the second section of the new act had no legal effect whatever. The Legislature simply did an act, under a misapprehension of the status of the law, which, by reason of that mistake, had no legal effect whatever.

2d. This act of March 27, 1869, does not validate the statute mentioned in the bonds as their foundation, because it does not refer to it at all, but refers to an act bearing a different title, and to an act which was *in force* February 18, 1857. We have shown that the supposed statute mentioned in the bonds *was not* "*in force*" February 18, 1857, because it was not passed by the Senate. The act referred to in this statute of March 27, 1869, is described as one which *was* "*in force*" February 18, 1857. The title of the act mentioned in the bonds was "an act *authorizing* cer- "tain cities," &c. The title of the statute mentioned in the act of March 27, 1869, is "An act to *authorize* certain "cities," &c. The act in question, which we have proven to be void, is therefore not the act mentioned in the statute of March 27, 1869, and therefore is not affected thereby.

3d. Even should we concede that the act mentioned in the bonds is the same that is mentioned in the act of March 27, 1869, and that the effect was to validate the act which was, before that, utterly void, still it would only place the old act on the footing of coming into force on the 27th day of March, 1869, and that will not help the defendant in error; for, even on that hypothesis, the bonds are void, for the election upon which they profess to rest was void.

By the terms of the statute of February 18, 1857, which, on this hypothesis, came into force March 27, 1869, the election is required to be called by the clerk "in the same "manner that other elections for said county are called."

Referring to the statute of Illinois in force in 1869, as to to the manner of calling county elections, we find that general elections were called by the clerk, giving 30 days' notice, and that special elections were called by the clerk, giving 20 days' previous notice of the time and places of the election. The election in this case was on the 30th day of March, 1869, and it is so stated on the face of the bonds. Of this, the buyer of this bond had notice. He also had notice (on this hypothesis) that the statute under which the election was held did not come into force until March 27, 1869—only three days before the election was held. He also had notice that the law required twenty days' notice to be given prior to the election, to render the election valid under the statute. He therefore knew that, by no possibility, could there have been more than *three days'* notice of this election, and that hence the election was void, and of course the bond was void ; for, by the statute named in the bonds, no lawful election could be held on less than *twenty days'* notice.

This act of March 27, 1869, cannot be construed as retrospective or as having a retro-active effect ; for its terms do not warrant that construction, and the Legislature had no power to give it such retro-active force, so as to give validity to acts which, when done, had no validity whatever.

Blanchard v. *Sprague*, 3 Sumner, 535.
Calkins v. *Calkins*, 3 Barbour, 305, (S. C.)
Snyder v. *Snyder*, 3 Barb., (S. C.) 621.
Wood v. *Oakley*, 11 Paige Chan., 400.
Hackley v. *Sprague*, 10 Wend., 116.
Dash v. *Van Kleeck*, 7 Johns., 477.
1 Kent, 455, * Note A, 456.
Berley v. *Rampacher et al*, 5 Duer.
Plumb v. *Sawyer*, 21 Conn., 351.
Austin v. *Stevens*, 24 Maine, 520.
People v. *Supervisors, &c.*, 10 Wend., 365.

Jackson v. *Van Zandt*, 12 Johns., 169.
Van Renssalaer v. *Livingston*, 12 Wend., 490.
Webster v. *Cooper*, 14 Howard U. S., 504.
Proprietors, &c., v. *Laboree et al*, 1 Greel., 275.
Ely v. *Hoton*, 15 N. Y., 595.
Humphrey v. *Parsons*, 15 N. Y., 595.
Carroll v. *Lessees, &c.*, 16 Howard, 275.
Harvey v. *Tyler*, 2 Wallace, 328.
Ogden v. *Blackledge*, 2 Cranch, 272.

4th. The Legislature of 1869 had no power to impose, by statute, a debt upon the municipal corporation *in invitum;* and none but the people of the county, or township, voting in some mode provided by statute, or the corporate authorities of the county or township, could give valid consent. The board of supervisors are the corporate authorities of a county. The chairman of the board and the county clerk are not the corporate authorities of the county. And the supervisor and town clerk of the township are *not* the corporate authorities of the township. Hence, even if it had been the declared intention of the act of March 27, 1869, to validate the old void act of February 18, 1857, and to validate proceedings had under the supposed authority of the void act, which proceedings took place before March 27, 1869, the Legislature had no such power.

By the Constitution of 1848, it was provided, Section 5, Article 9, as follows:

"The corporate authorities of counties, townships, * "* * may be vested with power to assess and collect "taxes for corporate purposes, such taxes to be uniform," &c.

This section has been construed by the Supreme Court of Illinois to be not a grant of power—but a *limitation* of

power in the Legislature. It is held that the Legislature cannot impose upon a county or township by statute any liability for local purposes, without the consent of the county or town. It has also ruled in substance that such consent cannot be lawfully given in behalf of the county or township, except by a vote of the people, in a mode authorized by law at the time of the election, or by the direct action of the "corporate authorities" of the municipality. Also, it has been decided that the supervisor and town clerk of a township are not the corporate authorities of a township, and cannot give such consent, and also, that the chairman of the board of supervisors and county clerk are not the corporate authorities of a county, and can not give valid consent for the county. These principles are found in *Marshall* v. *Silliman*, 61 Ill., 219.
Harwood v. *The St. Claire, &c.*, 51 Ill., 130.
Also, *People* v. *Mayor, &c.*, 51 Ill., 30.

That is, while the Legislature might, under our constitution, authorize the board of supervisors of a county, or the town meeting of a township, to contract a debt for railroad purposes, involving the levy of taxes, *without* a special popular vote, (because the board of supervisors are "the corporate authorities" of the county, and the town meetings constitute the corporate authorities of the township, and, therefore, within the provision of Sec. 4, Art. 9 of the constitution); still the Legislature could not lawfully authorize the chairman of the board, and county clerk, or the supervisor and town clerk of a township, to contract such a liability without a vote of the people, because those officers are not "the corporate authorities of the county," or of the township.

And such vote of the people, to have any valid effect, must be conducted according to some mode prescribed by law, in force at the time when the proceedings for election transpire.

Applying this doctrine, the Legislature might give authority to the board of supervisors of the county, or to the town meeting of a township, to subscribe stock and issue bonds therefor, without a popular vote, and such subscription and bonds would be valid; but the Legislature could not give this power to the chairman of the board and county clerk, or to the supervisors and town clerk of a township. In this case the board made no subscription of stock, and never ordered any issue of bonds for stock. The bonds, on their face, say they are issued by the chairman and clerk, and not by order of the board of supervisors. Such an issue by the chairman and clerk, under our constitution, must be supported, not only by a statute authority, but also by a vote of the people, taken in some way provided by statute. The Legislature having no power to dispense with a popular election in such case —cannot, if they would, by curative act, supply the constitutional requirement—by substituting a past void election, (or any proceeding essential to such election), for a valid, future one, whereat it was the lawful duty of the voter to attend. To do this would be to impose such liability by mere act of the Legislature, upon the county, without the consent of the county. The county can only consent by its corporate authorities, (the board of supervisors), or by a vote of the people taken in a manner prescribed by statute at *the time* of such election.

Defendant, in error, relies also upon a statute found on page 362 of Vol. 3, Private Laws of 1869, passed April 20, 1869, entitled, "An act to amend an act entitled 'an act au-" thorizing certain cities, &c., to subscribe to the stock of cer-" tain railroads,'" *in force February* 18, 1869, which, in section one, provides that, (in addition to the cities, counties, towns and townships, *authorized* by said act, to which this is an amendment, to subscribe to the stock of the Ott., Os. & F.

River Valley Railroad), the following *portions* of cities, counties, townships, &c., be and are hereby authorized to subscribe to the capital stock of said railroad in manner as provided in said act, except as hereinafter provided.

Sections 2 and 3 provide for calling and holding elections, &c., requiring 30 days' notice, &c.

Section 4 is as follows: "All bonds issued under this "act, or to be hereafter issued under the act to which "this is an amendment, may be issued in sums of from "$100 to $1,000." (This act came in force April 20, 1869.)

This statute does not profess to *validate* the act which it professes to amend. No such effect can justly be given to it. It was plainly not the intention of the Legislature to produce any such effect. Neither the letter nor the spirit of the act indicate any such intention. The act, like that of March 27, 1869, was passed under a misapprehension by the Legislature. The first section was intended to place certain fractions of townships on the same basis with certain townships, under the old act, supposed to be in force, and does not, in any way, affect counties and townships described in the old void act of February 18, 1857. The second section was simply intended to remove a limitation supposed to exist in the old act. By the terms of that act, the bonds could not be of less denomination than $1,000. This second section was intended merely to reduce that limitation, so that no bonds should be issued of a denomination of less than $100. The section gives no new power, nor any power at all, to issue bonds, but provides that, "when issued," &c., they *may* be in sums from $100 to $1,000. The election mentioned in the recitals of the bonds in controversy, had transpired before this act was passed. The election was void when it occurred. It could not be validated by a curative act, so as to charge the municipal corporation with a debt or liability which it

had not authorized, and neither this act nor the act of March 27, 1869, professes to be, or can be, construed to be curative acts.

Most that we have said of the act of March 27, 1869, is applicable to this act of April 20, 1869, and the Supreme Court of Illinois have decided that these acts of March 27, 1869, and April 20, 1869, do not validate the act of February 18, 1857.

Miller et al. v. *Goodwin et al.*, 7 Legal News, 294.

III.

Again, the bonds set out in the declaration, and produced at the trial, profess to set out on their face the authority upon which they were issued. They set out expressly that they depend upon the supposed act of February 18, 1857, for the authority on which to rest. Neither the railroad company, nor the present holders of these bonds, can be heard *now* to allege that these bonds were issued, *not* under, and by virtue of the act of February 18, 1857, as stated on the face of the bonds; but were issued under *that* act, and *an act to amend that act*, and also an act to amend the charter of said railroad company. On the face of the bond their bed is made, and on that, and on that alone, they must lie.

Suppose a man had three different powers of attorney, as agent of one principal — and he in doing an act in behalf of his principal — expressly professes to exercise *only* the powers conferred by *one* of these powers of attorney, and that power of attorney is set out in full in the instrument he executes — and it turns out that the act done was not warranted by *that* power of attorney — shall it be said that the principal shall be bound by the act of the supposed agent? We say, no. The agent held three

powers ; he undertook to exercise one of the powers, and did not *attempt* to exercise either of the others. It cannot be said, it's true, he exceeded the power which he did profess to use, but he had another power which he *might* have exercised, if he chose, and that other power would, if exercised, validate the act, and hence the act is valid. Neither can it now be said, true, the act of February 18, 1857, (under which alone these officers acted in making these bonds, and professed to act), was void ; but there were other powers under which these officers might have acted, and then the bonds would be valid — hence they are valid. The answer is, these officers never attempted or pretended to exercise any powers under the act of March 27, '69, or April 20, '69; and hence, no power in those acts (if any there be) was ever exercised by these officers, who, on May 4, 1869, had no knowledge of these statutes. The bonds were made under the old dead act of February 18, 1857, and by it must stand or fall.

IV.

The defense of the plaintiff in error in this case ought not to be regarded with an unfavorable eye by the court, as an inequitable defense.

All the facts alleged in the special plea, and all the facts which plaintiff in error offered to prove at the trial, and which were excluded by the court below, must in this court be taken as true. It must also be remembered that the real parties represented here by the municipal corporation are the taxpayers of the same, who are to be charged with these bonds, if at all, against their will, and without any agency on their part. The court will therefore take notice that the railroad runs through a mere corner of the territory of this municipal corporation — in such situation, that to a majority of the taxpayers it can be of no possible

use; and the court will remember, that at the election a majority of these tax-payers did not vote for the issue of these bonds (but merely a majority of those who took part in the election), and that at the time of the election the proceedings had no sanction of law, and no man was bound to take part in the same. The court will also remember that those voters, who did vote for subscription, were fraudulently cheated into that mode of voting.

The defendant in error may, in some sense, have equities, but they are no higher than the equities of these tax-payers. Defendant in error may be a holder of these bonds for value — but he is not a holder without notice, for the records, on their face, told him these bonds were void.

V.

The record shows that plaintiff in error offered to prove, by competent evidence, that the bonds in question were issued, not for the stock of said railroad company, but as a donation to the railroad company, to be applied in payment of contractors who were building the railroad. The evidence offered proves this, and also proves that no subscription for stock was ever made by the municipal corporation, and no stock was ever received by the corporation for these bonds, or promised to it by the railroad company; so that, even if the act of February 18, 1857, had been regularly passed, these bonds were not issued under that law for stock, but were issued for another and different purpose — as a donation, and there is no statute authority for so doing — and the bonds are hence void.

Marsh v. *Fulton Co.*, 10 Wallace, 676.

Many of the questions here presented are discussed in brief of plaintiff in error — in case 254 — *South Ottawa* v. *Perkins.*

T. LYLE DICKEY,
For Plaintiff in Error.

SUPREME COURT

OF THE

UNITED STATES.

THE BOARD OF SUPERVISORS
—OF—
KENDALL COUNTY,
Plaintiff in Error,

vs.

AUGUSTUS T. POST,
Defendant in Error

BRIEF OF DEFENDANT IN ERROR.

HAY, GREENE & LITTLER.

Of Counsel for Defendant in Error.

SPRINGFIELD:
Frank Hudson, Jr., Printer, 221 S. 5th Street,
1876.

SUPREME COURT OF THE UNITED STATES.

THE BOARD OF SUPERVISORS
—OF—
KENDALL COUNTY,
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Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

The defendant in error recovered judgment against the plaintiff, in the Circuit Court of the United States for the Northern District of Illinois (Drummond J. presiding), on the 29th day of May, 1874, for the sum of $13,000 debt, and the further sum of $1188.05 damages in an action of debt, brought on certain bonds issued by the plaintiff to the Ottawa, Oswego & Fox River Valley Railroad Company. As all the questions in this case arise out of the alleged non-passage of the act of the Illinois Legislature mentioned in the bonds upon which suit was brought, we here insert said act in full, together with two certain acts of said Legislature, amending the same, for the convenience of the Court and counsel—and also Section 80, Chapter 86, Gross' Statutes of Ill., entitled "Railroads."

"An act authorizing certain Cities, Counties, incorporated "Towns and Townships, to subscribe to the stock of certain "Railroads.

"Section 1. Be it enacted by the people of the State "of Illinois, represented in the General Assembly, That any "city, county, incorporated town, or any township, now or "hereafter organized under the township organization laws, "which may be situated on or near the route of the Ottawa, "Oswego & Fox River Railroad, or of the Chicago, Amboy "& Upper Mississippi Railroad, or of the Joliet & Mendota "Division of the Joliet and Terre Haute Railroad, as the "same may have heretofore or may hereafter be surveyed "and located, may become subscribers to the stock of any "such road; and may issue bonds for the amount of such "stock so subscribed, with coupons for interest thereto at- "tached, under such limitations and restrictions, and on such "conditions as they may choose, and the directors of said "company may approve; the proposition for said subscription "having been first submitted to the inhabitants of such city, "county, town or township, and approved by them. And upon "application of any fifty voters of any city, county, incorpor- "ated town, or township, as aforesaid, specifying the amount to "be subscribed, and the conditions of said subscription, it "shall be the duty of the clerk of such city, town, county, "or township, immediately to call an election, in the same "manner that other elections for said city, county, town, or "township are called, for the purpose of determining "whether said city, county, township or town will sub- "scribe to the stock of said road, and if a majority of said "voters shall be "for subscription," then the County Court, or "Board of Supervisors having jurisdiction over county matters

"in said county, or the corporate authorities of said city "or town, or the Supervisors and Town Clerk of such township "so voting, shall cause said subscription to be made, and "upon its acceptance by the directors of said company shall "cause bonds to be issued in conformity with said vote, which "bonds shall in no case bear a higher rate of interest than "ten per cent. per annum, and shall not be of less denomination "than one thousand dollars, and shall be accepted by said "company at their par value.

"2. Any township in Kendall County and the town-"ship of Plainfield, in Will County, shall have like power to "subscribe for the stock to any railroad now or hereafter locat-"ed through said township, and issue bonds therefor in the "same manner as provided in section first, or to vote a sum, "not exceeding five thousand dollars, to pay damages for "right of way through said town, for any such railroad.

"3. This act shall be in force from and after its passage, "and shall be liberally construed for the purposes expressed "therein, and shall be held to be a public act.

"4. It shall be the duty of the proper authorities of "any city, incorporated town, county, or township issuing "bonds as aforesaid, to make all necessary arrangements, and "provide for the prompt payment of all interest and other "liabilities accruing thereon, and to levy such taxes as may "be necessary therefor, as other taxes are levied by them.

"Approved Feb. 18th, 1857."

This act will be found in the laws of 1857 of Illinois, on pages 225—6.

The Illinois Legislature of 1869 passed an act which is in the words and figures following:

"An act to amend an act entitled 'An act to incorporate "the Ottawa, Oswego & Fox Fiver Valley Railroad Com- "pany.'

"Section 1. Be it enacted by the people of the State of "Illinois, represented in the General Assembly, That the "Charter of the Ottawa, Oswego & Fox River Valley "Railroad, be and the same is hereby so amended as to au- "thorize said company to build its road from the town of "Wenona, in the County of Marshall, in a southwesterly "direction, through the Counties of Marshall, Woodford, "and Tazewell, to the City of Peoria, in the County of "Peoria.

"2. That any city, county, town, or township, near "to or through which said railroad is now or may hereafter "be located, is hereby authorized to subscribe to the capital "stock of said railroad, upon the terms and conditions pre- "scribed in an act entitled 'an act to authorize certain cities, "counties, towns, and townships to subscribe to the capital "stock of certain railroads,' in force February 18–1857.

"3. This act shall be deemed a public act, and in force "from and after its passage. Approved March 27–1869."

This act will be found in the private laws of Illinois, 1869, volume 3, page 329.

The act first mentioned was again amended by the Legislature of Illinois, at its session in 1869. The title of this last mentioned act expresses that it is an act to amend the act of Febuary 18–1857. The beginning of the first section is "That in addition to the cities, counties, towns and "townships, authorized by the said act to which this is an

"amendment, to subscribe to the capital stock of the Ottawa, "Oswego & Fox River Valley Railroad, the following "portions of cities, counties, towns, and townships be, and "the same are hereby authorized to subscribe to the capital "stock of said Ottawa, Oswego & Fox River Valley Rail-"road in manner as provided in said act, except as hereinafter "provided." Then follows a long list of towns and townships, not mentioned in the act of 1857. The second section of the act provides, in substance, that the election shall be called, and the vote taken in the manner provided for calling elections by the act of 1857. The third section of this act is as follows:

"It shall be the duty of the proper authorities of any "of said cities, counties, towns, and townships, upon a vote "being carried 'for subscription' as provided by the act "aforesaid, by the legal voters of any of the said portions of "cities, counties, towns, or townships, for the amount voted "for, to deliver the same to said railroad company at par for "its stock, to make all necessary arrangements for the prompt "payment of the same, principal and interest, and to levy "the necessary taxes therefor, upon the particular portion so "voting, as aforesaid."

Section 4 is as follows:

"All bonds issued under this act, and to be hereafter "issued under the act to which this is an amendment, may be "issued in sums of from one hundred dollars to one thousand "dollars."

Section 5. "This act shall be a public act, and shall be "in force from and after its passage.

"In force April 20th, 1869."

Private laws of Illinois, 1869, volume 3, pages 362–3.

For the purpose of getting before the Court all the statutes of Illinois upon which we desire to comment hereafter, we here insert section 80 of chapter 86, Revised Statutes of Illinois, by "Gross," page 547:

"No subscription shall be made or purchase or bond issued by any county or city under the provisions of this act, whereby any debt shall be created by said Judge of the County Court of any county, or by the Common Council of any city, to pay any such subscription, unless a majority of the qualified voters of such county or city (taking as a standard the number of votes thrown at the last general election previous to the vote had upon the question of subscription under this act for county officers) shall vote for the same; and the Judges of the County Court of any county, or the Common Council of any city, desiring to take stock as aforesaid, shall give at least 30 days notice in the manner as notices are given for election of state or county officers in said counties, requiring said electors of said counties, or said cities, to vote upon the day named in such notices at their usual place of voting, for or against subscription for said capital stock which they may propose to make, and said notices shall specify the company in which stock is proposed to be subscribed, the amount which it is proposed to take and the time which the bonds proposed to be issued are to run, and the interest which said bonds are to bear, or in case it is proposed to borrow money to pay such subscription, then the notices shall state the terms upon which such loan is to be effected, and the opinion of the electors shall be expressed upon their ballots 'for subscription' or 'against subscription,' and counted and returned by the judges and clerks of elections as in other cases, and if a majority of the

" voters of said county or city, assuming the standard afore-
" said, shall be in favor of the same, such authorized sub-
" scription or purchase, or any part thereof, shall then be
" made by said Judges or Common Council. In case any elec-
" tion had under this act is held upon a day of a general elec-
" tion, then the number of votes thrown at such general elec-
" tion for county officers shall be the standard of the number
" of qualified voters as aforesaid. No bonds shall be issued
" under the provisions of this act by any county or city
" excepting for the amounts required to be paid at the time of
" subscription, and for the amounts of and at the time when
" assessments upon all the stockholders of said company shall
" be regularly assessed and made payable."

The facts as disclosed by the record are that the General Assembly of Illinois, at its session in 1857, passed or attempted to pass the act first hereinbefore set out. That afterwards, on the 27th day of March, 1869, the second statute set out herein was approved, and became a public law of Illinois. That on the 20th of April following, the third act hereinbefore set out in part became a public law of Illinois. It is also a fact, that section 80, chapter 86, Gross' Statutes, has been a part of the public law of Illinois since 1849, and said entire chapter was in full force and effect at the time of the issue of the bonds here in suit. It further appears that Kendall county, recognizing the validity of the act of 1857, called an election in pursuance of the terms thereof for the purpose of ascertaining whether the legal voters thereof would subscribe 50,000 dollars to the capital stock of the Ottawa, Oswego & Fox River Valley Railroad Company, which election was held on the 30th day of March, 1869, three days after the approval of the second act copied in this brief. It further appears that said election resulted in a ma-

jority of the votes being cast "for subscription," which result was duly declared. In pursuance of this election the Board of Supervisors of said county afterwards, to-wit: on the 4th day of May, 1869, issued $50,000 of the bonds of said county, in payment of that amount of stock subscribed to said railroad company, and said company thereupon issued and delivered to said county its stock to that amount. The thirteen bonds here in suit are a portion of said issue. It further appears from the bonds in suit that all the interest coupons were cut off prior to the bringing suit, and the presumption is that they were paid as they matured. It further appears that one installment of interest was paid by the county after the bonds matured, and that said payment is endorsed on the bonds. The record also shows that defendant in error is a bona fide holder of the 13 bonds, for full value before maturity, and that unless the law charges him with knowledge of the alleged defects in the passage of the act of 1857, he had no knowledge thereof.

It is further conceded that defendant had no actual knowledge of the alleged failure of the Board of Supervisors of Kendall County to comply with all the provisions of law in issuing said bonds; nor had he any actual knowledge of the representations made said county by the officers of said railroad.

In short, the record shows that defendant purchased the bonds for full value before maturity, paid his money for them, and is entitled upon principles of common honesty and fair dealing, to be reimbursed by the county.

The first question to which we call attention is the sufficiency of the second plea (Record pages 21–2–3.) To this plea we filed a general and special demurrer (Record p. 23–4)

and after argument the plaintiff in error confessed the demurrers and took leave to amend its said plea. The ammendment consisted of striking out the conclusion to the "country," and inserting a conclusion with a "verification." (Record page 25.) To this amended plea we extended our general and special demurrers, and the court again sustained the demurrers. (Record page 25.) The view we take of this case renders it unnecessary that we should spend much time in discussing the special demurrer. In fact both the plea and demurrers have lost much of their original importance, as none of plaintiff in error's evidence was excluded for want of a sufficient plea. It is our desire, and we think it is that of plaintiffs' counsel, that the questions involved in the record which go to the right of defendant to recover under any circumstances, shall be considered and decided by the Court. In discussing the merits of this second plea, plaintiffs' counsel called it a "*special traverse*;" and as it differs in its frame from any we have ever seen or heard of, and knowing no name by which to call it, we adopt the name conferred upon it by its author. Whilst mention is incidentally made of this form of pleading by Chitty, in his work on pleading, he does not either in his text or precedents give it a place of any practical importance. This author treats the "*special traverse*" as having fallen into disuse even at the time he wrote. Stephens on Pleading, in discussing this plea, says: "Though "this relic of the subtle genius of the ancient pleaders has "now fallen (as above stated) into comparative disuse, it is still "of occasional occurrence, and it is remarkable therefore "that no author should have hitherto offered any explanation "of the objects for which it was originally designed." [Stephens on Pleading, 9 American Edition, side page, 175.] Assuming, however, that this form of pleading is still recog-

nized in proper cases, we still say the plea is bad, first because it does not conform in its structure to the rules governing this "*ancient relic*," and because it concludes improperly. The author above mentioned, (side page 168,) in discussing the "special traverse," after noticing the different parts which go to make up the plea, says: "The different parts and prop-"erties here noticed are all essential to a special traverse, "which must *always thus consist of an inducement, a denial and* "*a conclusion to the country.*" We were able, in discussing this plea in the court below, to show not only to the satisfaction of the Court, but to counsel for plaintiff in error, that a plea which put in issue the passage of a statute in the manner provided by the Constitution of Illinois, should not conclude to the country. The admission of this fact is at once an admission that the plea as a "*special traverse*" is bad on demurrer. But the plea is bad because it recites a great multiplicity of facts which are wholly immaterial, and which under no circumstances can be put in issue in this case. To illustrate—the plea recites the several entries on the journals of the Illinois Legislature in relation to the passage of the bill for the act of 1857, from the time of its introduction to its approval by the Governor as a law. The constitution of Illinois in force at the time of the approval of the act in question required the journals to show affirmatively but two facts in relation to the passage of a law, viz.: First that the vote should be by ayes and noes, and second that this vote should be entered on the journals. [Ill. Constitution 1848, Sec. 21, Article 3] And the Supreme Court of Illinois, [Supervisors of Schuyler Co. vs. People ex rel., 25th Ill., page 184] say, in construing the above mentioned provision of the constitution:

"But where the constitution is silent as to whether "a particular act which is required to be performed "shall be entered on the journals, it is then left to the discre- "tion of either house to enter it or not, and the silence of "the journal on the subject ought not to be held to afford "evidence that the act was not done. In such case we must "presume it was done unless the journals affirmatively show "that it was not done."

In view of the foregoing, we think it makes no difference what the journals show or fail to show in relation to the passage of a law, so long as they do show the two facts prescribed by the constitutional provisions above mentioned. Therefore we insist that all the allegations of said plea, except the allegations that the vote on the final passage of said bill was not taken by "*ayes and noes*" and that the same was not entered on the journals, are immaterial and serve no purpose in this case unless it be to incumber the record. It seems to us that the rules of good pleading only require, in a case of this kind, the pleader to set out the alleged defect in the journal. If the defect thus set out is a constitutional one, the plea will be simple, and sufficient, and will require an issue.

Again, the plea is bad because it contains an allegation triable only by the court, as well as allegations triable by jury. The court alone can pass on the question as to whether a law is in force, but the question as to whether the preliminary steps in relation to issuing bonds under a certain statute had been complied with, is a question for the jury, and for this reason the plea is bad.

Again, the plea is bad because it contains more than one defense (assuming the facts in relation to the passage of the

act of 1857 are a defense). It alleges facts showing a non-compliance with the provisions of the General Railroad Law of Illinois in force at the time the bonds were issued, and it is also bad in failing to allege that defendant in error had any knowledge of said failures to comply with the law. Again, assuming that the plea is good in form and substance, we still say it is bad on demurrer, because all the facts alleged are properly admissable under the first plea. (Non est factum)

The first plea (*non est factum*) is sworn to, and under this plea the plaintiff in error, under the Illinois practice act, was not only allowed to disprove the signatures, but to interpose any defense that would be good at common law.

Stephenson vs. Farnsworth, 2 Gill., 715.
The Governor vs. Lagow, 43 Ill., 134.

Admitting the Court erred in sustaining the demurrer, no injury was sustained by plaintiff in error—no evidence was excluded because of insufficent pleas; and this Court, at the October term 1874, in County of Lee vs. Henry Clews et al., held that it would not reverse where the error was "a *harmless one.*" Again, and lastly on this point, we insist the plea is bad, because the plaintiff in error is estopped from setting up the facts therein alleged, as against the defendant in error, but as we desire to treat this question of estopple under a separate head, we here close our argument of this branch of the case.

We come now to consider the question, as to whether the act of 1857 is, and was at the time of issuing the bonds in suit, a valid law of Illinois. At the threshold of this inquiry we are confronted with two decisions of the Supreme Court of our own state, holding in terms that said act of

1857 never became a law; and the bonds here in suit, and all other bonds issued under said law, are absolutely null and void for want of power in the corporate authorities to issue the same. In view of the gross injustice, which not only the defendant in this case must submit to, but the innocent holders for full value of more than $400,000 of bonds, issued under the act of 1857, in case said decisions of the Illinois Supreme Court shall be held by this Court to be the law, we invite the careful consideration of the Court to the reason we shall urge against the soundness of said decisions. And first, this Court is not bound by the decisions of the Illinois Supreme Court in this case, because the suit at bar involves a "*question of general commercial law*," and this Court has so held in divers cases, beginning as early as the case of Swift vs. Tyson, 16 Peters, page 1.

This proposition is so well settled, that we deem the citation of authority almost useless.

This Court (Township of Pine Grove vs. Talcott, 19 Wallace, 666) said:

"Questions relating to bonds issued in a negotiable form, "under an act of a state legislature, involving questions rela- "ting to commercial securities, and whether under the consti- "tution of the state such securities are valid or void, belongs "to the domain of general jurisprudence. This Court will "accordingly not follow the decisions of the Courts of the "state where the bonds are issued, as to their validity and "constitutionality under the laws and constitution of the state, "if the judges here disapprove of those decisions." We assume, in view of the decisions of this Court already made, that in determining whether the act of 1857 is, in fact, a law

of the state of Illinois, the Court will pay little or no attention to what the Supreme Court of Illinois have said on the subject, but will examine and pass upon the question as an original one. Now, what are the facts upon which the plaintiff in error relies to establish the non-passage of the law of 1857? They attempt to show this by certain oral testimony and by a certificate of the Secretary of State of facts taken from a certain "*well bound book*" in his office called the "*journal record.*" We deny that this journal record, either by the Constitution of Illinois or the law of Illinois requiring it to be kept, is evidence for any purpose *in the first instance.* We insist, that before the contents of this book can be made evidence to destroy the force and effect of a statute which has been recognized as a public and valid law of Illinois for nearly twenty years, and under which nearly a half million of municipal bonds have been issued and sold to innocent parties, the plaintiff in error must not only show that the "original journal" is lost, but he must go further and show that the "well bound book" is a correct copy of the original, so far at least as it relates to the act of 1857. This the plaintiff has not done, as the record abundantly establishes. The *language* of the Illinois Constitution is: "*Each House shall keep a journal and publish the same.*" Section 3, Chapter 84, Revised Statutes of Illinois, 1845, is the section under which plaintiff in error claims the "well bound book" as evidence to establish the non-passage of the law in controversy, and it is as follows:

"The journal of each house of the General Assembly "shall hereafter be kept in well bound books. The secretary "of the Senate and clerk of the House of Representatives shall "furnish to the public printer every morning, during each

"session of the General Assembly, a copy of the journal kept "by them, respectively, of the day's proceedings—the last day's "journal; and the said secretary and clerk shall, within ten "days after the adjournment of each session of the General "Assembly, deposit the *original journals* kept by them as afore- "said, with the Secretary of State."

Section 5 of this statute reads as follows:

"And the Secretary of State shall likewise superintend "the printing of such laws, acts and resolutions, carefully com- "paring the printed copies with the *original laws and rolls de- "posited in his office,* correcting all errors that may appear in "such printed copies, and shall make and cause to be printed "at the end of such printed copy, his certificate that the acts "and resolutions so printed are exact copies of the *rolls* in his "office."

Section 5, of Chapter 96, Revised Statutes of Illinois, 1845, reads as follows:

"The Secretary of State shall, when required by any per- "son or persons so to do, make out copies of all laws, acts, "resolutions or other records appertaining to his office, and "shall attach thereto his certificate under the seal of State, "and for which he shall be entitled to such fees and compen- "sation as now are or hereafter may be allowed by law."

And section 8 of the same act provides—

"The secretary of the Senate and clerk of the House of "Representatives, at the close of each session of the General "Assembly, shall deliver to the Secretary of State all books,

"bills, documents, and papers in the possession of either "branch of the General Assembly, correctly labeled, folded "and classed according to the subject matter of such docu- "ments, respectively; and the Secretary of State is required "to file the same in his office."

It is stated in substance by the Supreme Court of Illinois, in Miller vs. Paddock *et al.*, 7th vol. *Legal News*, page 294, that by section 3, of chapter 84, above copied, the "*well bound books*" mentioned in that section take the place of the *original journals*, and their contents is proper evidence in the *first instance*. The theory upon which the Court reach this conclusion is: that the books are copied in pursuance of law, and that the officer performing the labor acted under the solemnity of an official oath in copying, comparing and certifying the same; and the Court, in support of this view, say that "deed "records, and records of the proceedings of courts contain no "certificates by the clerks by whom they are made, appended "either at the close of the volume or elsewhere, that they "are accurately and truly made, and we have never yet heard "that copies of them might not be read in evidence in proper "cases, on account of this omission."

Let us examine whether this proposition, admitting it to be good law, has anything to do with the question as to the admissibility of the "*well bound books*" as evidence. Certified copies of Court records are admissable as evidence by an express provision of our statute, (Revised Statutes of Illinois, 1874, page 490, section 12,) and but for this provision the original record would have to be introduced or its loss accounted for by affidavit or other satisfactory evidence. So with refer-

ence to the admissibility of the record of a deed, except that the record can only be read in evidence after proof of the loss of the *original.* By section 35, chapter 30, Revised Laws of Illinois, 1874, it is expressly provided that the record of the deed may be read in evidence only after the loss of the original is satisfactorily accounted for to the Court, and unless its loss can be so explained, the copy or record is not admissible. Our Supreme Court seem to have grouped these two sections together, for it makes no distinction between the rule governing the admission of copies of records and the one governing the admission of the record of deeds. It will be seen on an examination of the sections above mentioned that there is a wide distinction between them. The first mentioned section makes the copy of the record evidence in the first instance, whilst the second section (in relation to deeds) allows the record te be read in evidence only atter the loss of the original is accounted for to the satisfaction of the Court.

Now, what have either of the above rules to do with the case at bar? We answer, nothing; because the evidence referred to is the subject of statutory regulation; and in the absence of these statutes, the records and the copies of the records would be secondary evidence, and their contents could only be shown after accounting for the loss of the originals in the manner prescribed by the general rules of evidence on the subject of secondary evidence. We admit it is competent for the legislature generally to change the rules of evidence, but unless the rules are so changed, then the original of any document or record must be produced or its loss accounted for before the copy can be resorted to, and before the copy can be read in evidence it must be shown to be a *true* copy of the

original. This proposition, we think, cannot be successfully controverted.

Assuming the rule last mentioned to be correctly stated, we now proceed to examine the statute under which the Supreme Court of Illinois say the "well bound books" are to be received as evidence in the first instance. In examining this statute, we are willing, in order to accommodate the Supreme Court of Illinois, that the whole statute shall be construed together; not only this, we are willing that all the statutes which can possibly throw any light on the question as to the intention of the Legislature shall be resorted to, to aid the court in reaching a proper conclusion. We say first, then, taking the whole statute together, there is not a line, or word, which in terms makes the "*well bound book*" evidence in the first instance. In fact the statute is entirely silent on the question as to whether these books shall be evidence under any circumstances for any purpose whatever. In discussing this statute, we do not feel called upon to show this Court just what the law-making power intended in its passage. If we can show to the satisfaction of the Court that the Supreme Court of Illinois has placed an erroneous construction upon the statute, we will have accomplished all we hope for. It may be the legislature only intended to give the Secretary of State an opportunity of making an honest dollar in copying the journals, but our impression is it was the intention in the passage of the law to put the journals in better shape for preservation, and with the view of resorting to the "well bound books" in case of the loss of the original.

It will be observed, on an examination of this law, that it does not even require the record of the journal, when copied into the "books," to be compared with the original, nor is any

certificate as to the correctness of the copying required by the act. In the absence of such requirements in the law, we are justified in stating that no such precaution was taken in copying into these "books." We are also fully justified by the evidence taken in this case, in stating that the Secretary of State in *person*, did not copy a line in the books. On the contrary, the journals of the Legislature of 1857 were copied into these "well bound books" under special contract, by some half dozen or more clerks. So that the copying was not done under "*the obligations of official duty.*" On the contrary, it was done by a party who was personally interested in doing it quick and cheap, rather than accurately.

Recurring again to section 3 of the act under consideration, we find it is made the imperative duty of the clerks of the respective houses, within 10 days after the adjournment of the Legislature, "*to deposit the original journals kept by them as aforesaid, with the Secretary of State.*" We must in this connection, and before commenting further on the law, give our Supreme Court the credit of having coined a new phrase by which this original document shall be hereafter known, "*the minutes of the journal.*" If it was the intention of the legislature by the act to supersede the original journals as evidence, why require the original journals to be deposited with the Secretary of State, if the "well bound books" were to take its place in the archives of the state—why preserve the original—what purpose was it thereafter to subserve. It is clear that the original journal could not occupy the same position as evidence as the "well bound books;" one is merely or supposed to be merely a copy of the other. Now either the *original journal* or the well bound books are *the journals* of the legislature for the purpose of determing the acts of

that body, and for the purpose of furnishing the *first and best* evidence of those acts. In order to answer which of these records should be received, suppose the original journal and the well bound books were both in existence, and the original should show the passage of the act of 1857, in manner and form as prescribed by the constitution, and the well bound books should show the defect alleged in the pleadings in this case—would any court in christendom allow the contents of the latter books to overcome the original journal—manifestly no court would so hold. Then if the Court would subordinate the well bound books to the original journal, in case they were both in existence, we think it clear the original journal is the first and only evidence, until its loss or destruction is accounted for. In short, it makes no sort of difference what the "well bound books" or the printed journals show or fail to show, so long as the original journal shows the passage of an act in due form—and neither of these books, either by force of the statute or under the general rules of evidence, could be introduced to impeach the same. The Supreme Court of Illinois must have seen the force of this position when it gave the original journal the name of "*Minutes of the Journal.*" It must have been apparent to that Court, that there could be but one "original journal" for the purpose of furnishing evidence to impeach the validity of a statute, and in order to make the "well bound books" supersede that instrument designated by the constitution as "the journal," and by the law authorizing the "well bound books" to be kept as "*the original journals*," the Supreme Court call "*the original journal*" the "*minutes of the journal.*" The Supreme Court of Illinois call that document which is read at large every morning (unless the rule on that subject is suspended) and the errors, if any, corrected by the legislature, the "minutes of the journal."

Now, the word "minutes" imports simply a short sketch in writing; and yet, by the terms of section 3 of this well bound book act, it was made the duty of the Secretary of State to furnish to the public printer every morning during the session, a copy of the journal (*or this brief sketch*) for publication; and by section 5 of the same act it was made the duty of the Secretary of State to superintend the public printing "and carefully compare the printed copies (not with "the well bound book) with the original laws and rolls de- "posited in his office, correcting all errors that may appear in "such printed copies." Thus it will be seen that the very act relied upon by the Supreme Court of Illinois to destroy the force and identity of the original journal, carefully preserves the same and treats all other journals as merely copies of this document, and it requires the printed copies to conform strictly to it. It seems strange to us, if the legislature intended to treat the well bound books as the journals, that it should have required more strictness and care in preparing the printed copies than in preparing the copy contained in said books. In aid of our view of this subject, we call attention to sections 5, 7 and 8 of chapter 96 (above quoted), and in connection therewith we also call attention to the case of Spangler vs. Jacoby, 14 Ill., page 199, where the Court, in construing these sections, say :

"When an act has gone through all the forms of legisla- "tion it is deposited in the office of the Secretary of State. " *The journals of the two Houses take the same direction.* They "all become records of his office, and may be certified as such "under the seal of the state."

And, in the same paragraph, the Court further say—

"The journals of either branch of the legislature are the

"proper evidence of the action of that branch upon all mat-
"ters before it."

Thus it will be seen that the Court decide what are the journals and what journals are evidence of the acts of the legislature. The "well bound books" are not mentioned by the Court in this case. Again, the Court in the same case say—

"The journal is made up under the immediate direction
"*of the House*, and is presumed to contain a full and complete
"history of its proceedings."

This case is in harmony with the constitution, the law we have quoted, and the general principles governing the introduction of written evidence, and is in direct conflict with the case of Miller vs. Paddock. The Court, in speaking of the journal in this case, call it by its proper name—it had not at that time occurred to the Court to call it "the minutes of the journal." This, we presume, may be accounted for on the ground that the Court, as then constituted, had not as much genius in the way of inventing new names by which to call that instrument by which the question as to the passage of laws is to be determined. Again, the Supreme Court of Illinois [I. C. R. R. vs. Wren, 43 Ill., page 77] say:

"We are not aware of any law which makes the printed
"journal evidence of the contents of the original."

And in the same case the Court further say—

"A duly authenticated copy of so much of the *original*
"*journal* as shows the facts relied upon by counsel for im-
"peaching a law *prima facie* valid *must* be brought before us
"through the record."

Here we find the Court treating the "*minutes of the journal*" as the original journal, and insisting that the validity of a statute can only be impeached by the original journal. It is expressly held in this case that the printed journals, notwithstanding the great care required by the sections of the statute already quoted, in comparing them with the original, are not evidence, and its contents will not be allowed to impeach the act. If, therefore, the printed journal is excluded as evidence on the ground that it is not the original, upon what principle of reasoning (in the absence of an express statute) can the "well bound books" be admitted? Manifestly, only upon the ground that they take the place of the original, and this ground is not sustained either by the former decisions of our Supreme Court or by a fair construction of the statutes of Illinois on the subject.

In conclusion of this branch of the case, we claim that the "*original journal*" is the only instrument in the first instance by which the validity of the act of 1857 can be impeached, and that the "well bound books" cannot be used for that purpose until the loss of the original is proven; and that said books, so far at least as they relate to the passage of said act, is a true and correct copy of the original. This the plaintiff in error has not done, and cannot do, as we think. We, therefore, say there is no evidence before the Court which legally establishes the fact that the act of 1857 was not passed in manner and form as prescribed by the constitution.

In concluding our argument on this branch of the case, we have only to say, in reply to the long array of authorities cited by counsel for plaintiff in error, on page 10 of his

brief, in support of the general proposition that a statute can be impeached and overthrown by showing by the *original journals* that it did not pass in manner and form as prescribed by the constitution, that we admit the soundness thereof, but at the same time deny that it is competent under the facts presented in the record of this case for the plaintiff in error to make such defense.

Assuming, however, that the record shows the non-passage of the act of Feb. 18th, 1857, and that the plaintiff in error can take advantage of the alleged defect in the journals, we next inquire as to our rights under the amendatory acts of March 27th and April 30th, 1869; both of which acts were *approved prior to the issue* of the bonds in controversy, and their validity is not questioned. By the terms of section 2nd, of the act of March 27th, 1869, express power is given the municipalities therein mentioned, to subscribe to the capital stock of the railroad and issue their bonds in payment thereof. By this act of March, 1869, "*the old void act*" as counsel terms it, or at least so much thereof as prescribed the terms upon which stock might be subscribed and bonds issued in payment thereof, became a part of the act of March, 1869, as completely as if it had been rewritten and incorporated as a part thereof, and this, whether the act of Feb. 18th, 1857, ever became a law or not. It was competent for the legislature to make the provisions of the last named act a part of the act of 1869, by an intelligent reference to it. That body could have prescribed that the notice, election, etc., should have been in pursuance of the terms and conditions of resolutions of a Board of Supervisors, or in pursuance of the terms prescribed in certain *Repealed Statutes*. In other words, it

was not necessary to re-write the act of 1857, in order to make it a part of the act of March, 1869.

Dew vs. Cunningham, 28 Alabama, 466.

Bibb Co. Loan Association vs. Richards, 21 Georgia, 592.

In view of the foregoing, we claim that by the act of March 27th, 1869, and also by the act of April following, Kendall County had ample power to issue the bonds in controversy, and which power was not exercised till May 4th, 1869.

The county having power to issue the bonds, both by the terms of the acts already commented upon, as well as by the terms of the General Railroad Law of Illinois of 1849, any irregularity in the exercise of the power can make no difference to an innocent holder for value.

Lynd vs. County, 16 Wallace, 6-13.

St. Joseph Township vs. Rogers, 16 Wall., 644.

City of Lexington vs. Butler, 14 Wall., 282-296.

It is said, however, that there were but three days intervening between the passage of the act of March, 1869, and the election authorizing the issue of the bonds, which took place on the 30th of that month, and for this reason, the bonds carried notice on their face of their irregular issue, and consequently there could be no innocent holder.

Whether this proposition is true or not depends upon the effect to be given to the act of March, 1869. We insist that the act shall be held to be retroactive in its operation, so far as it may be necessary in order to validate the bonds in suit.

In contending for the retroactive operation of this statute, we admit at the outset that it was not the intention of the legislature to give it such effect. We also admit that the legislature was ignorant of the supposed defects in the passage of the act of 1857; and we further admit the general rule contended for by plaintiff in error, viz: that statutes are to be construed as operating only *prospectively*. This general rule of construction is like most other general rules of law—it has its exceptions, as we shall hereafter see. Sedgwick, in his treatise on Constitutional Law, page 202, concludes his discussion of this principle by announcing the result of his inquiries to be: 1st. The legislature can give a statute retroactive force unless the act violates the Constitution of the United States in relation to *ex post facto* laws and the obligation of contracts, or unless it interferes with the vested rights of property, or unless it is in violation of the State Constituf tion. It is, therefore, competent for the legislature to pass retroactive laws on all subjects not embraced within the above mentioned exceptions. This Court, as well as the Supreme Court of Illinois, has recognized and approved a law passed to validate the acknowledgment of deeds. All Courts recognize the right of the legislature to pass laws changing the rules of evidence. Judge Cooly, in his recent work on "Taxation," page 299, in discussing this question, says:

"The general rule has often been declared that the legis-
"lature may *validate retrospectively* the proceedings which they
"might have authorized in advance. Therefore, if any direc-
"tions of the statute fail of observance which are not so far
"of the *essence of the thing to be done*, that they must be
"provided for in any statute on the subject, the legislature
"may retrospectively cure the defect."

Again—

"Remedial statutes may be of a *retroactive nature* provided "they do not impair contracts or disturb absolute vested "rights, but only go to confirm rights already existing and in "furtherance of the remedy by curing defects and adding to "the means of enforcing *existing obligations.*

Silsby vs. Redlon, 19 Wis., 25.

We could multiply authorities on this proposition, but deem the foregoing sufficient to establish the right of the law-making power to pass retroactive statutes subject to the restrictions and limitations above noted.

Having established the principle of retroactive legislation, we next inquire what construction will the Courts give a statute where there is nothing on its face to indicate that it was thei ntention to give it retroactive force. We have already admitted that the legislature, in passing the amendatory acts of March and April, 1869, was ignorant of any defect in the act of 1857, and consequently, in the passage of those acts, had no intention to give them retroactive operation—

"It is well settled that in construing a doubtful statute, "and for the purpose of arriving at the legislative intent, all "acts on the same subject matter are to be taken together and "examined in order to arrive at the true result. All acts in "*pari materia* are to be taken together as if they were one "law. When there are different statutes in *pari materia*, "though made at different times, *or even expired* and not re-"ferring to each other, they shall be taken and construed to-"gether as one system, and as explanatory of each other."

Sedgwick Const. Law, 274.

Applying this rule to the case at bar, we insist the Court should hold that by the act of March, 1869, the notice of the election mentioned in the bonds in suit was retroactively authorized and legalized, as this is all that is necessary in order to entitle us to recover, assuming the positions of counsel for plaintiff in error to have been well taken. The Court must conclude from all the acts of the legislature in question that it was the intention of that body to give Kendall county full power to subscribe to the stock of the railroad and issue its bonds in payment thereof; and taking all the acts together there can be no question that this power existed at the time of the issue of the bonds. By such construction the Court will be giving expression to the intention of the legislature in passing the statutes, and also to the county of Kendall in voting the subscription and in issuing the bonds, and such a construction would be in harmony, also, with the ends of justice, which result must always (according to Judge Cooley on Taxation, page 222,) be kept in view by the Court in construing a statute.

There can be no doubt that by the act of 1857 it was the intention of the legislature to confer full power on Kendall County to subscribe stock and issue its bonds to the railway company mentioned; nor is there any doubt that in March, 1869, the legislature ratified and extended the powers mentioned in the first act. Therefore, if this county did not have the right to vote subscriptions and issue bonds in payment thereof at the time the power was so exercised, it was no fault of the legislature, for it is clear that by these different statutes it was the intention to confer such power.

"The rule that statutes in *pari materia* are to be consulted "for the construction of each other holds good, though *some*

"*of the statutes may have expired or even been repealed*, and "whether they are referred to or not, all acts which relate to "the same subject—notwithstanding some of them may have "expired or are not referred to—must be taken to be one sys- "tem and construed consistently."

Sedgwick Const. Law, 251.

Admitting, therefore, that the "*old void statute*" of 1857 was entirely inoperative at the time of the passage of the act of March, 1869, we still have a right to refer to it for the purpose of arriving at the intention of the legislature. These three statutes, making a "system of laws" of themselves when all examined together, lead to but one conclusion, viz: that it was the intention of their authors to confer the powers upon Kendall County hereinbefore mentioned; and such being the intention of the law-making power, it is doing no violence either to the law-making power or the County of Kendall to hold in this case that, as the legislature was mistaken as to the validity of the act of 1857 at the time of the passage of the act of March, 1869, that said last mentioned act shall be deemed to have retroactive force, so far as to authorize the notice of the election in the bonds mentioned—such construction would give force to the several statutes, and at the same time prevent Kendall county from repudiating an honest debt. On the other hand, if the Court shall adopt the views insisted on by plaintiff in error, the intention of the legislature will be defeated, and the plaintiff will thereby be enabled to perpetrate a gross fraud upon the defendant.

With these suggestions, we submit this branch of the case.

Counsel for plaintiff in error, on page 17 of his brief, insists that the corporate powers of the county must be exercised by the Board of Supervisors (which is the corporate authority of the county), and not by the chairman and clerk of said board; and counsel, in support of this proposition, cites divers authorities. We have only to say that the proposition contended for is undoubtedly good law, but we are unable to perceive what it has to do with this case, as no such question can possibly arise on the record.

Counsel for plaintiff in error, on the first page of his brief, sets out—or attempts to set out—a copy of the condition of the bonds in suit; but he has left out a very important portion thereof, which omission probably accounts for his argument of the last mentioned proposition. The bonds in this case do not on their face purport to have been issued by the "chairman" and clerk of said board on their own *authority.* These officers were used by the Board of Supervisors of Kendall County merely as its *instruments* to witness the official action of the board. The language of the bond is: "In witness "whereof the chairman of the Board of Supervisors of said "county," by order thereof, "has hereunto affixed his signa- "ture officially," etc.; "*and all of which is attested by the clerk.*" In other words, the Board of Supervisors directed their chairman, on behalf of the board, to sign the bonds, and the clerk to witness the same by his signature and official seal, which is the usual and most convenient way for such bodies to give expression to their official action.

All this was done in pursuance of a resolution of the Board of Supervisors, as appears not only from the face of the bond, but by a copy of the resolution of said board, as appears on page 28 of the record in this case. Hence, we insist

that the proposition of law contended for has nothing whatever to do with this case.

It is, however, insisted that we are bound by the recitals in the bonds, and cannot go outside thereof, for authority to justify their issue. In other words, if the act of 1857, recited in the bond, conferred no power to issue the same, and at the same time there was ample power, both by the terms of the acts of March and April 1869, as well as by the General Railroad Law of Illinois then in force, yet we shall not be allowed to invoke the powers contained in these statutes, simply because they are not mentioned in the bond, or apparently relied on to justify the issue thereof.

We understand this Court to have decided in substance, a number of times, that the only available defense to a municipal bond in the hands of an innocent party, for value before maturity, is a *total want* of power in the municipality to issue the same. This proposition seems so well settled by the decisions of this Court, that we deem the citation of authorities unnecessary.

Assuming, therefore, that a want of power is the only defense that can avail the plaintiff, we insist that if the power existed, either by general law or special statute, at the time of the issue of the bonds, we have a perfect right to rely upon the same, whether it is recited in the bond or not. Counsel for plaintiff seems to think that the act of 1857 was the only law relied upon for authority to issue the bonds, but we insist that by the express terms of the recitals in the bonds that such is not the case.

The bond recites that "previous application having been "made to the Clerk of the County Court of said county, and

"said clerk having called said election, in accordance there-
"with, and having given notice of the time and place of
"~~poling~~ holding the same, as *required by law*, and the act aforesaid."
Thus it appears that the election was not only called by virtue of the act of 1857, but as "*required by law*" *and the act aforesaid.* It would seem from this recital, that the election was called, as much in pursuance of law, as under the "*act aforesaid.*" Now, we insist that at the time this eleetion was called and held, Kendall County had perfect right and full power under the General Railroad Law of Illinois of 1849, to hold the same and to issue the bonds in pursuance thereof, and we also insist that we have a right to invoke that authority, both by the terms of the bonds as well as upon general principles.

We call attention to the provisions of this general law, and particularly to section 80, chapter 86, Gross' Statutes, as set out in full in our brief. It will be seen by an examination of this section, that full power was conferred upon counties to vote subscriptions to railroad companies, and issue their bonds in payment thereof, and this statute was in full force at the time of calling the election, as well as at the time of issuing the bonds; and, for aught that appears on the face of the bonds, this statute was as much relied on as the "*act aforesaid.*" But we deny that we are confined to the powers relied on by the county. The mere mis-recital of the power will not destroy the power, if in fact it existed at the time of the issue of the bonds. Nor can the county skulk behind this mis-recital, and say that we shall not refer the Court to the proper sources of power.

Counsel for plaintiff says:

"Suppose a man had three different powers of attorney "as agent of one principal, and he, in doing an act in behalf "of his principal, expressly professes to exercise *only* the "powers conferred by *one* of those powers of attorney, and "that power of attorney is set out in full in the instrument he "executes, and it turns out that the act done was not war- "ranted by *that* power of attorney; shall it be said that the "principal shall be bound by the act of the supposed agent? "*We say no.*"

We say yes! the principal will be bound, particularly if that principal happens to be a municipal corporation acting through its officers, and in support of this view we here allow the Supreme Court of our own state to speak:

"If a municipal corporation, in dealing with individuals, "assumes that it possesses certain corporate powers, upon "which the validity of its acts depends, and it turns out that "it does not possess the specific powers relied on, it is not "thereby excused from the performance of its obligations, "if they *can be performed through the agency of other powers that* "*it does possess.*"

Maher vs. City of Chicago, 38 Ill., 273.

From this authority it would seem to make no difference whether the power is properly recited in the bond or not. If the act performed is within the scope of the powers conferred upon the municipality, the Court will not allow the corporation to evade an honest debt, by setting up that it did not recite properly its corporate powers. As we have already said, the only question for this Court is, did the power exist at the time the bonds were issued. If so, we insist, there is an end of all defenses to this action.

For the purpose of argument, we now admit the non-passage of the act of 1857—and the failure of the acts of 1869 to operate retrospectively upon the notice of elections, and still insist there is no defense to these bonds. Because the county is estopped by its own acts, from denying or questioning their validity. We concede that the Supreme Court of Illinois, in Miller vs. Paddock et. al., supra, say: "that no "subsequent act or recognition of their validity could so far "give vitality to them as to *estop* the tax-payers from denying "their legality."

We have already attempted to show that this Court is not bound by the decision of the Illinois Supreme Court, because the question involved is one of "general commercial law;" we now insist that the decision should be disregarded so far as it holds that the County of Kendall is not estopped to make the defense here set up, because the same Court has decided, both before and since the case of Miller vs. Paddock, that similar facts would estop both corporations and individuals. In People vs. Brown, 67 Ills., 435, the Court say:

"The doctrine of estoppel is, that when a person by his "words or conduct voluntarily causes another to believe in "the existence of a certain state of things, and induces him "to act upon that belief, so as to change his previous posi-"tion, he will be estopped to aver against the latter a dif-"ferent state of things."

Now, the record in this case shows that the people of Kendall county voted to subscribe $50,000 to the capital stock of the railroad; that in pursuance of this election the corporate authorities of the county subscribed said sum; that in payment thereof they issued and delivered the bonds in con-

troversy among others; that the defendant in error paid full value for these bonds before maturity; that Kendall county has paid the interest on these bonds year after year. In all these acts the county has recognized the validity of the act of 1857, and by these acts, one and all, it has said to all the world that these are binding and subsisting obligations against the county. Again, the county remained perfectly quiet from the time of the issue of the bonds (May 4, 1869) till the commencement of this suit; during all which time it *acquiesced* in the binding force of the bonds, and by its repeated payment of interest thereon, gave renewed assurances to the commercial world of the binding force of the bonds and of the intention of the county to pay the same.

If these facts will not create an estoppel, we confess our inability to conceive of a state of facts that would create such estoppel.

In further criticism of the case of Miller vs. Paddock, we call attention to the fact that *not one reason is assigned* for the monstrous proposition that the county is not estopped by its conduct. In view of the repeated declarations of the same court on kindred questions, we say the unsupported doctrine of this case is not entitled to any great consideration at the hands of this Court. The former doctrine of the Supreme Court of Illinois was:

"It would be manifestly against every principle of justice "to permit the tax-payers and citizens of a county, through "their officers, to procure money, labor or materials upon "bonds of the county issued on an affirmative vote of the citi- "zens at an election held in a case authorized by the law, to "escape all liability because of some slight informality in con-

"ducting the election, which was, or at least might have been, "readily known to every citizen of the county before the "bonds were issued. Counties have no right to procure all "the benefits of an act which they are authorized to perform, "recognized and acted upon by them as legal, and then escape "liability, any more than have private individuals. They "must respond to their legal engagements to the same ex-"tent as individuals."

Johnson vs. County of Stark, 24 Ill., 90.

In the case at bar, Kendall County, according to the evidence, got precisely what it contracted for, viz: a railroad through the county and $50,000 of the stock of the company; and now, after the maturity of its bonds we find it still holding on to the railroad and at the same time trying to repudiate its most solemn obligations. After pledging the "*faith and credit*" of the county, we find it solemnly engaged in trying to defeat innocent holders of its bonds, who purchased them believing the people of Kendall county were really honest.

Again—

"And whether the bonds were issued by virtue of the sec-"ond section of the special charter of 1857, which expressly "authorized them, or under the seventeenth section which "legalized and confirmed what had previously been done, the "corporation is estopped from setting up any irregularity in "their issue, after having repeatedly recognized their validity "by paying them out and levying taxes and paying the interest "on them for a series of years."

President, etc., of Keithsburg, vs. Frick, 34 Ill., 405.

It appears from this case that the town of Keithsburg issued its bonds in the sum of $20,000; that it relied upon certain powers contained in its charter of 1857, and did not rely upon the general powers of the railroad law of 1849, the 80th section of which we have set out in this brief. The Court held the subscription *good under either law*, and estopped the corporation from denying the same.

The three cases last cited from the Supreme Court of Illinois are in direct conflict with the case of Miller vs. Paddock, relied on to defeat the recovery in this case. Two of these cases were rendered prior to that of Miller vs. Paddock, and the other was rendered subsequent thereto. These cases are supported by the principles of justice as well as sound reasoning, whilst the case of Miller vs. Paddock has neither *justice or reason*, and rests solely on the *arbitrary* declaration of the Court.

In Hasbrook vs. Milwaukee, 13 Wisconsin, the Court, in discussing the question as to whether, under a subsequent act of the legislature, a municipal corporation is liable to pay a debt which it had no power to contract in the first instance, say—

"It is undoubtedly true that in cases like the present, "where there is a strong moral but no legal obligation to pay, "Courts have often seized, and may again seize upon very "slight circumstances of assent in order to give effect to the "contract. And in this case, if it appeared that the city did, "by some authorized action procure the passage of the act, "or had subsequently acquiesced in it by ratifying the con- "tract, there would be little difficulty in the way of holding it "bound by its terms."

In Kneeland vs. Gilinan, 24 Wis., 39, the Court say:

"As to matters within the scope of their powers, corpora-
" tions may be estopped and agreements made in their behalf
" may be ratified by acquiesence and accepting the benefits
" of them." To the same effect, substantially, is Putman vs. New Albany, 4 Bissel, 365; and this Court, in 19 Wallace, Town of Pine Grove vs. Talcott, 678, state, in discussing the question of estoppel, that—

"It would be in the highest degree inequitable and unjust
" to permit the defendant to repudiate a contract, the fruits of
" which he retains."

Again, in case of The State vs. Goshen, 14 O. S. R., 559, the Court say—

" Acts of subsequent *acquiesence and ratification* will estop
" the township from objecting to the validity of the bonds in
" the hands of an assignee for value who has taken them on
" the faith of such acquiescence, on account of any irregulari-
" ties attending their execution and issuing, short of such an
" absence of power or such an illegality as would render them
" absolutely void; *and notice of such irregularities on the part
" of the assignees will not defeat the estoppel.*"

Here the broad doctrine is announced that ~~when~~ the holder of a municipal bond for value had notice of irregularities in the issue, yet such notice would not prevent a recovery. This Court has repeatedly held that when the authorities of a municipal corporation pass upon the preliminary steps required to be taken in the issuance of bonds, and such officer certified to the regularity of such preliminary steps, this action on the

part of the officer will estop the corporation from questioning the regularity of such steps, because the officer acts as the agent of the corporation. This doctrine is fully sustained in St. Joseph Township vs. Rogers, 16 Wallace, 644.

Plaintiff in error insists that it became the duty of the purchasers of the bonds issued under the act of 1857, to ascertain, before their purchase, that the supposed act was in fact a valid law of the State of Illinois; that they were bound to know the constitutional requirements in relation to what facts the journals of the legislature should show, and in fact, what the journals did show as to the passage of the law in controversy. Can it be true, that before a man can with safety invest his money in a bond purporting on its face to have been issued in pursuance of an act of the legislature, duly printed and published with the laws of the state and certified by the Secretary of State, he must go to the capital of the state, and there run down the journals of its legislative body, and ascertain for himself that the law was regularly passed.

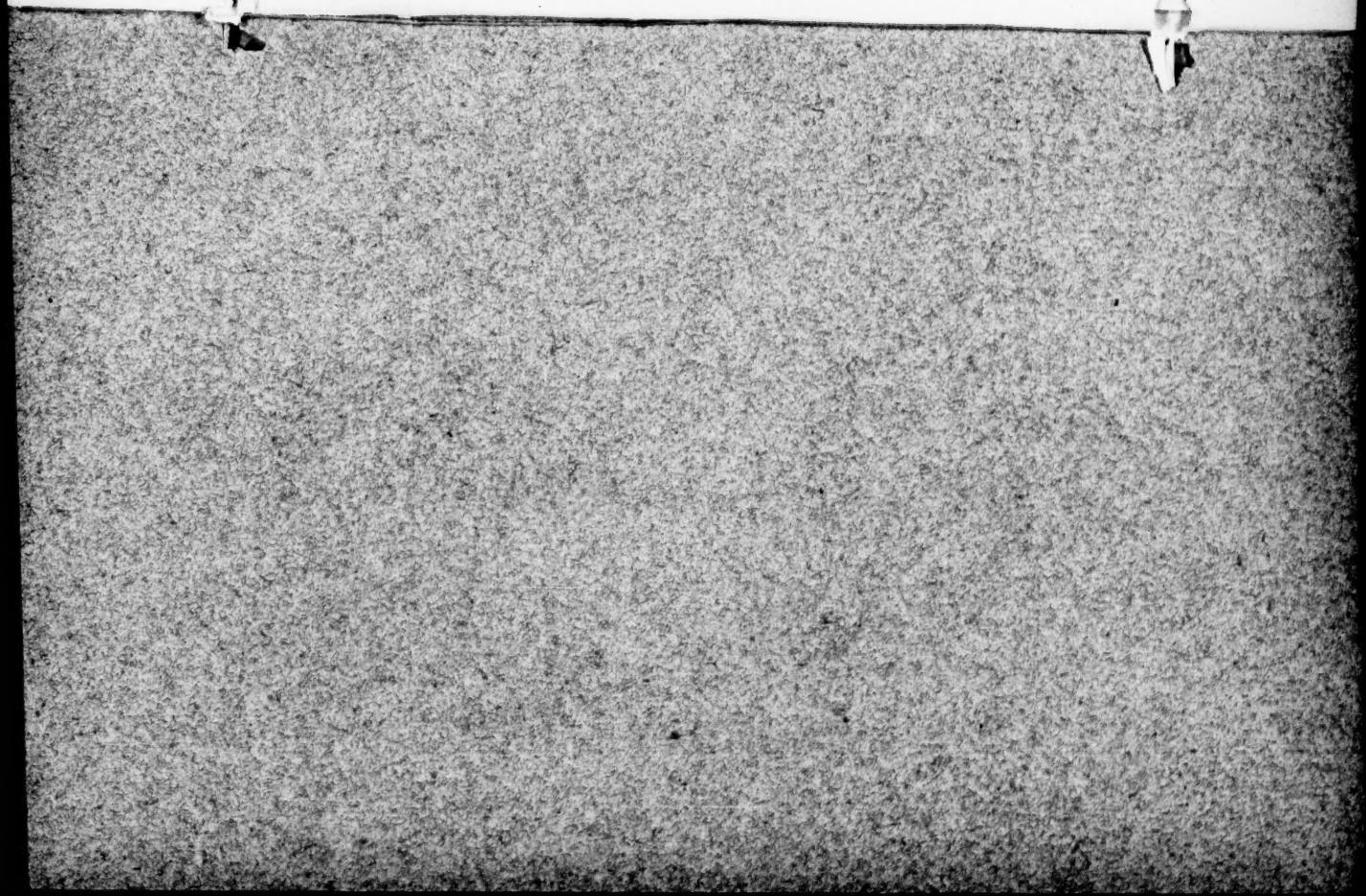
The establishment of such a doctrine would practically put an end to the negotiability of municipal securities, both at home and abroad; more than this, it would impose a duty on the purchaser which properly rests on the municipality assuming to exercise the power of issuing the securities. This act of 1857 served the purpose of plaintiff in voting a subsidy to the railroad company, as an inducement to the location of their line of road through Kendall County. The county availed itself of the provisions thereof, voted, subscribed to the stock, received its stock, and issued its bonds in payment thereof, and by repeatedly paying interest thereon,

gave renewed assurances to the commercial world of their binding force; and now we insist, that by all the principles of law, as well as honesty and fair dealing, it should be compelled to redeem its most solemn obligations.

Respectfully submitted.

HAY, GREENE & LITTLER,

Of Counsel for defendant in error.



12 Wall 4 26 Clifford

IN THE

Supreme Court of the United States.

TOWN OF SOUTH OTTAWA
vs.
PERKINS.
} No. 58.

BOARD SUPERVISORS, Kendall ~~Randall~~ County,
vs.
POST.
} No. 59.

Is a Municipal Corporation, when sued by the bona fide holder of its negotiable bonds, estopped from pleading that the act under which they were issued is unconstitutional and void?

Brief of P. PHILLIPS,

For Plaintiff in Error,
on Re-Argument.

WASHINGTON:
R. O. POLKINHORN, PRINTER.
1877.

March 17 1877

Argument for Appellee

Supreme Court of the United States.

TOWN OF OTTAWA
vs.
N. PERKINS.
No. 58.

Brief of P. PHILLIPS,

On Re-argument.

The town of Ottawa is now before the court resisting the payment of bonds issued to a railroad company. The plaintiff is a *bona fide* holder of these negotiable securities.

The ground of resistance is the alleged want of power in the officials of the town to issue these bonds, and the question is whether there is any principle of law which estops the town from making good this defense *in an action at law brought to enforce these bonds.*

That such a corporation has no power to issue such securities without authority delegated by the Legislature is not to be now discussed. It has passed from the field of debate, and rests in the repeated adjudications of this tribunal.

If the power can only be exercised when the Legislature confers it, it would seem to follow that the Legisla-

ture could annex such conditions and limitations to its exercise, as are deemed advisable, and that these would be binding on the corporation and all who deal with it under this delegated authority.

Under this head there has always been a serious division of opinion among the members of the court; a majority holding, under various circumstances, that a non-compliance with these conditions and limitations could not be urged as against a *bona fide* holder of such securities.

It is not necessary to go into the enquiry whether the opinion of the majority or minority is the better sustained by principle and authority, for the question now for debate reaches very much further.

That question is whether a municipal corporation is estopped, when sued on such an instrument, from showing that the act of the Legislature under which it was issued, was unconstitutional and void.

The affirmative of this proposition has never, before the hearing of this case, received the sanction of any judge of this tribunal, and we undertake to show it cannot be maintained, without overruling everything that has been heretofore held on this subject.

In other words, we affirm that all of the present justices, who have delivered opinions in these municipal bond cases, however much they may have differed as to whether non-compliance with the conditions annexed to the authority constituted a legal defense to the corporation, have uniformly concurred in the proposition that when no power has been conferred to issue such bonds, the corporation was not estopped from defending them, even as against a *bona fide* holder.

The first in the series of decisions on this subject is the case of *Knox* v. *Aspinwall*, 21 How., 544. The Court will note how carefully the doctrine is announced by NELSON, J.

The ground upon which the want of authority to execute the bonds is placed is the omission to comply with the requisition of the statute *as to the notices to be given of the election.*

"It is insisted that this irregularity had the effect to deprive the board of this authority, or, rather, furnish evidence that the power had never vested in it, and that the plaintiffs are chargeable with knowledge of this and not entitled to the character of *bona fide* holders.

The act, say the Court, under which the bonds were issued is a public statute, and it is undoubtedly true that any person dealing in them is chargeable with a knowledge of it; and as this board was acting under delegated authority, *he must show that the authority has been properly conferred.*"

The Court then decides that the statute conferred the power, and thus proceeds.

The case assumes that the requisite notices were not given of the election; and hence that the vote has not been in conformity with the law.

This view would be decisive against the authority were it not for a question that underlies it, and that is, who is to determine whether or not the election has been properly held and a majority of the votes cast in favor of the subscription? This is answered by the Court in declaring that it was for the board to decide, and as the bond recited that the election had been held in pursuance of the act, this was a sufficient protection to a *bona fide* holder.

Here we have the distinct announcement that any one

dealing with such a corporation, exercising a power conferred by statute, is charged with full notice of it, and must show that the authority has been properly conferred.

Justice CLIFFORD was then on the bench, and concurred in this opinion.

In *Grepke* vs. *City of Dubuque*, 1 Wall., 203—a case most elaborately argued, SWAYNE, J., delivered the opinion—which opens thus:

"The whole case resolves itself into a question of the *power of the city to issue bonds for the purpose stated.*"

After citing the statutes, he says:

"By these enactments, if they are *valid*, ample authority was given to the city to issue the bonds."

Again, "when a *corporation has power* to issue negotiable securities, the *bona fide* holder has the right to presume they were issued under the circumstances which gave the requisite authority." Citing *Knox* v. *Aspinwall.*

In this, CLIFFORD, J., concurred.

In *Marsh* v. *Fulton County*, 10 Wall., 682, the statute of Illinois gave full power to subscribe to any railroad, and for this purpose to issue bonds, but it also provided for an election, and that the notices for the same should "designate the company in which stock is proposed to be subscribed."

An election was held for subscription to the Mississippi and Wabash Road, which was chartered to construct a road from Warsaw to the east line of the State. A majority voted $75,000 for this purpose. Subsequently an act was passed by which the road was divided into

three parts, designated the Western, Central, and Eastern divisions.

After this, fifteen bonds of $500 each were issued to the Central division of the Mississippi and Wabash Company.

The action was on these bonds, and much evidence was introduced to show that in different ways the county had ratified this issue.

The counsel of Marsh relied on these facts, as well as on the plea that the bonds were in the hands of an innocent holder.

The judgment in this court was in favor of the county, the court holding that the subscription was to the Mississippi and Wabash Company, and that the Central division of the Mississippi and Wabash Company was a different corporation.

As to the want of notice to the bondholder, the court say, however innocent he might be in no wise affects the liability of the county. The holder was bound "to look to the action of the officers and ascertain whether the law had been so far followed as to justify the issue of the bonds."

In conclusion, it is said, "if a county obtains the money or property of another without authority, the law will compel restitution or compensation. But this is a very different thing from enforcing an obligation attempted to be created in one way, when the statute declares that it shall only be created in another and different way."

In this decision, CLIFFORD, SWAYNE, and STRONG, Justices, concurred.

In *Merchants Bank* vs. *State Bank*, 10 Wall, SWAYNE, J., delivering the opinion, says:

Where a party deals with a corporation in good faith—*the transaction not ultra vires*—and he is unaware of any defect of authority, or other irregularity, on the part of those acting for the Corporation, and there is nothing to excite suspicion of such defect or irregularity, the corporation is bound by the contract, although such *defect or irregularity* in fact exists. p. 644.

And CLIFFORD, J., in same case decides that—

"Persons dealing with an agent, knowing that he acts only by virtue of a delegated power, must, at their peril, see in each case that the paper on which they rely *comes within the power under which the agent acts.*" 675.

In *Pendleton County* vs. *Amy*, 13 Wall, 304, STRONG J., "without *legislative authority* municipal corporations may not issue bonds for subscription to Railroad stock, and if it does the bonds are affected by want of authority to make them."

But a purchaser is not always bound to look farther than to discover that the *powers had been conferred*, even although it be accompanied with conditions precedent.

In this doctrine, CLIFFORD and SWAYNE, Justices, concurred.

Again, in *Kennecot* vs. *Supervisors*, 16 Wall, 465, HUNT, J., delivered the opinion: "If there be *lawful* authority to issue the bonds, the omission of *formality*, &c., cannot be alleged against a *bona fide* holder seeking to enforce them. *There must, however, be an original authority by statute to issue them.*"

So in *Joseph Township* vs. *Rogers*, 16 Wall, 659. CLIFFORD J.: "If the bonds are issued by a corporation which possessed no power from the Legislature they are

invalid even in the hands of an innocent holder." This is repeated in different language by STRONG J., in *Nugent* vs. *Supervisors*, 19 Wall, 247: "The plaintiff is a *bona fide* holder of the coupons. If, then, the bonds were valid obligations, *if they were rightfully issued*, the right to a judgment against the county is plain."

Coming down to the most recent decisions, we reach the case of the Town of Coloma, 92 U. S., 490, in which Strong, J., delivering the opinion, declares it to be the *settled doctrine of the court*—that the holder of such bonds is *bound to know the law conferring upon the municipality power* to give the bonds on the happening of a contingency; but whether that has happened or not is a question of fact, the decision of which is, by the law, confided to others, and which the purchaser is, in general, in no condition to decide for himself."

In this announcement, WAIT, C. J., and CLIFFORD, SWAYNE, and HUNT, Justices, concurred.

The same doctrine is repeated by STRONG J., in town of *Venice* v. *Murdock* 92, U. S. 498; and in *Converse* v. *city of Fort Scott* same vol., 509.

And so, at the present term, it was held, in *County Commissioners* v. *Bolles*, No. 645,—STRONG, J., delivering the opinion—that a bona fide holder "is bound to look for nothing, *except legislative authority for the issue of the Bonds.*"

In all these cases the question was whether the corporation was estopped from showing its want of authority—and in all it is decided that there could be no estoppel where there was no authority conferred by the Legislature to issue the Bonds.

In exact conformity to the principles, so uniformly

declared by this Court, is the decision of the Supreme Court of Illinois, in *Ryan* v. *Lynch*, 68 Ill., 160. "If (say the Court), the Bonds were issued without any power or authority, they are absolutely void; but if the legal power or authority existed, but was defectively executed, they are only voidable, and an innocent bona fide holder would then be entitled to collect them."

The doctrine of *ultra vires*, so well settled in relation to public corporations, is assailed as inequitable, and the court is called on to discountenance such a defense.

A just appreciationof the relation of the membe rs of such a corporation to the body politic, as well as to each other, will show that this has as little foundation in equity as it has in law.

We are told of the many millions of bonds which have been issued by counties and towns on a vote of their citizens for works of public improvements, and it is said that such vote should be held in good faith as obligatory.

We are not to forget that the principle of universal suffrage prevails, and that these works always receive the sanction of those who desire employment, and have no taxes to pay.

Such subscriptions are therefore frequently made against the protest of property holders who have to pay the cost of failure.

Is it therefore in equitable that those who have to bear the burthen of taxation should be able to defend themselves against the exercise of usurped authority?

On what principle is a minority to be bound by the act of a majority, when that act finds no warrant in the articles of association, or in the constitution of its society.

Says SHAW, C. J.: "In aggregate corporations the act and will of a majority is deemed in law the act and will of the whole, and is therefore to be carried into effect as the act of the corporate body. The consequence is, that the minority must be bound not only without, but against, their consent. Such obligations may extend to every onerous duty—to pay money to an unlimited amount—to perform services—to surrender land—and the like. *It is obvious, therefore, that if this liability were extended to unlimited and indefinite objects*, the citizen, by being a member of a corporation, might be deprived of his most valuable rights and liberties. *The security against this danger is in a steady adherence to the principle stated, that corporations can only exercise their powers over their respective members, for the accomplishment of limited and well defined objects.*"

Spaulding v. *Lowell*, 23 Pick., 74.

The same learned Court has also said: "The limitation upon the power and authority of towns to enter into contracts is a wise and salutary provision of the law, not only as it protects the interest of a minority of the legal voters, but as it may not unfrequently prove *beneficial to the interest of a majority* who may be hurried into rash and unprofitable speculations by some popular and delusive excitement, to the influence of which even wise and considerate men are sometimes liable."

Parsons v. *Goshen*, 11 Pick., 398.

To the same effect is the language of EUSTIS, C. J.: "We do not understand that the fortunes of the citizens are thus at the mercy of those who are accidentally in the possession of administrative authority; nor that such a state of things can exist under our institutions, under which office does not confer omnipotency, and the law alone is supreme, and under their *ægis minorities must always find protection from the caprices of power.*"

State Bank v. *Navigation Co.*, 3 An., 294.

And, again, on the question of the constitutionality of an act, the Supreme Court of New York say—"But it may be asked are not *majorities to govern?* We answer they are to govern only in the *prescribed form.*

The minority have consented to be governed by *such statutes as are passed in the constitutional manner, but they have never consented to be governed by such laws as the majority should enact at the polls, and the constitution is designed for the protection of minorities against the caprices, recklessness, or prejudice of majorities.*"

Thorne v. *Cramer*, 15 Barb., 119.

In the case before us it is said that the *majority of those who voted* favored the issue of the bonds, but as the judgment rendered in this case will fall on the minority as well as the majority, we insist that by no rule of morals, and by no principle of law can the minority be thus held liable, if no power existed in the corporations to issue them.

We are not now dealing with the question whether a corporation borrowing money *can refuse to pay back the money*, because it is subsequently found it had no authority; the exigency of the case now before us does not require its determination.

Much may be said judiciously in favor of either side of such a question.

The case of *Thomas* v. *City of Richmond*, in which the decision was delivered by BRADLEY, J., was an action brought to recover on certain bills issued by the city as currency. It was earnestly contended that a recovery might be had on the money counts, as the city had received the amount in money or its equivalent.

The Court however held, that such issue of bills was

ultra vires, and the receiver of the bills was in *pari delicto*, and "should have no remedy *even for money had and received.*"

"The protection (say the Court) of public corporations from such unauthorized acts of their officers and agents, is a matter *of public policy* in which the whole community is concerned, and those who aid in such transactions *must do so at their peril.*"

All the justices concurred in this opinion. 12 Wall., 356.

So, in the case of *Burrell* v. *City of Boston*—in which the city was sought to be held liable on a contract relating to the public defense—it was held by CLIFFORD, J., that there was a want of power in the mayor to enter into such a contract, and that the consent of the city council was without efficacy, for the same reason.

It was therefore held, that the action could not be maintained on the express contract, "and that the same difficulty stands in the way of an implied assumpsit. *The better opinion is, that a promise to pay can never be implied in a case where the corporation possesses no power to contract.*" 2 Cliff., 596.

We repeat that we are not now to consider whether the corporation can be compelled to pay back the money it received, but whether *an action can be maintained to enforce the payment of the bond.*

The question now arises—did this corporation possess the power to issue the bonds at the time they were executed?

The bonds recite that they were issued in pursuance of the act of 1857.

This act appears in the printed volume of the laws of the State, with the signatures of the proper officials attached thereto.

But the Supreme Court of the state has in two cases decided that this act was not passed in compliance with constitutional requirements, and these decisions proceed in exact conformity with many previous adjudications on other acts whose validity was assailed on the same defects as exist in the act of 1857.

The result would seem to be that the act of 1857, being unconstitutional, is void and of no effect, and so the town was without authority to issue the bonds. To use the language of the court—" the bonds were not merely voidable, but absolutely void, and no subsequent act of recognition could so far give vitality to them as to estop the tax payers from denying their validity."

An unconstitutional act of the Legislature, will not even protect from liability the agents entrusted with its execution.

Am I now to be called on to argue that an unconstitutional act can have no effect?

What says the great Chief Justice? "The counsel for appellants are too intelligent, *and have too much self respect*, to pretend that a void act can afford any protection to the officers who execute it."

Osborn v. *Bk. U. S.*, 9 Wheat., 738.

It may be fully admitted that the holders of the bonds acted in entire good faith, and that it would have been indeed difficult to have obtained knowledge of the defect on which the invalidity of the statute has been declared.

But, we insist, this is entirely foreign to the question. The rule is a fixed and arbitrary one—that he who deals

with one exercising delegated authority, must, at his peril, take notice of the power of the agent.

An act of the legislature is not usually passed in opposition to an *express prohibition* of the constitution.

Every act is not only expressive of the legislative will, but of its opinion as to its constitutionality, and in every instance it is clothed with all the formalities required by the constitution, that is, it is signed by the proper officials, duly enrolled and published as the law of the state.

The most frequent cases where the judiciary has been called upon to set aside a law as unconstitutional, is when, by construction, the act is held not to be warranted, and in such cases, acts are frequently held to be void, when there is great diversity of opinion among the judges themselves upon this question of construction.

It is much insisted on that the act of 1857, under which the bonds were issued, was signed by the Speaker of the House, the President of the Senate, the Governor, and published with the laws of the State.

This is so. But, we repeat, in all the cases where acts have been declared to be unconstitutional, all these formalities and guaranties have existed.

Courts do not govern themselves by forms, but by the substance of things; and when the Legislature passes an act without complying with the fundamental law, no certification of officers, however high, can prevent their vindication of that law.

The constitutionality of acts in relation to such bonds has been frequently passed upon by this court.

In Aspinwall's case (*supra*) the act of January, 1849, authorized the subscription. In March the election was

had, and the subscription was directed, and in September, 1852, the board issued the bonds in pursuance of the said act and election.

But in November, 1851, a new constitution went into effect which prohibited borrowing money, &c., and the question was whether, at the time it went into effect, there was not such a right to the subscription and bonds vested in the railroad as could be upheld, notwithstanding the provision of the new constitution.

There was a unanimous decision in the negative, and this conclusion, the court say, was reached "with reluctance, as for aught that appears in the case the subscription to the stock was made, and the bonds issued in good faith to the railroad company, and also sold by it and purchased by the plaintiff in confidence of their validity."

In *Loan Association* v. *Topeka*, the bonds were issued under power expressly conferred by two acts of the legislature. The town subsequently recognized their validity by paying the coupons first due. Subsequent to this payment, the plaintiff purchased the bonds sued on. It was conceded that the steps required by the act, prerequisite to the issuing of the bonds, were regular, as was also all the other details, and that the language of the statute was sufficient to justify the action of the city authorities.

When the town was sued, it defended the action by denying that the legislature had authority to pass the acts under which the bonds were issued.

Here we have the case of full authority conferred by an act, and the issue of the bonds, with a full compliance of all the directions of the act. We have the ratification by the payment of the first coupons. The suit is brought by a *bona fide* holder of these securities, purchased after this act of ratification, and the question presented was

whether the town was estopped from showing its own want of authority; in other words, by pleading the unconstitutionality of the statutes under which it had acted.

The opinion of the Court was delivered by MILLER, J., and these acts of the Legislature were held to be void, and judgment given in favor of the town of Topeka. The invalidity of the acts was not placed on the ground of any prohibition in the State constitution, but because they permitted taxation in aid of a *private enterprise.*

What is a public use, for which taxes may be legitimately imposed, and in what it differs from a private one, it is admitted, is not always easy to define. But the Court say—"It is, notwithstanding, the duty of the Court, where the case falls clearly within the latter class, to interpose, when called on for the protection of the rights of the citizen, and aid to prevent his private property from being unlawfully appropriated to the use of others."

[Numerous decisions are cited showing that such statutes have been declared null by other courts.]

As to the estoppel, the Court say—"If the Legislature was without power to authorize the issue of the bonds, and the statute conferring the authority is void, the mere payment of interest cannot create of itself a power to levy taxes, resting on no other foundation than the fact that they once have been illegally levied for that purpose."

Mr. Justice CLIFFORD dissented, on the ground that the Court had no authority to nullify an act of the Legislature of the State "on the vague ground that it was opposed to a general latent spirit supposed to pervade or underlie the constitution, where neither the terms nor the implications of the instrument disclose any such restriction."

All the other judges concurred in the opinion, and among them are WAITE, C. J., and SWAYNE, STRONG, and HUNT, Justices. 20 Wall., 655.

Here we have the doctrine of estoppel as applied to public corporations with its well marked limitations. There can be no estoppel when there is absent an act authorizing the corporation, or when there is such act if it is unconstitutional.

And the same principle is applied to *private corporations* in the much quoted and much misunderstood case of Tarquand. Says the Vice-Chancellor, in *Fountain* v. *Railroad Co.*, "the result of Lord Campbell's judgment in Tarquand's case is, that where directors *have the power and authority to bind the corporation*, but certain preliminaries are required to be gone through with, before they can be exercised, *then* the persons contracting with the Directors are not bound to see that all these preliminaries have been observed. He is entitled to presume that the Directors are acting lawfully in what they do."

L. R., 5 Eq., 316.

It would seem to be wholly unnecessary to refer to other decisions in which acts, though clothed with all the formalities of law, have been declared invalid, and therefore affording no protection to persons, however innocent, who claim rights under them.

We assert that the just and inevitable conclusion to be drawn from all the decisions of the court is—that parties dealing with such corporations, are bound not only to know that the power has been conferred by an act of the legislature, but also to know whether such act is constitutional.

Mr. Dillon has given great attention to this subject, and in his monograph entitled—"Municipal Bonds," thus announces the result of these decisions.

They establish the following principles:

"*The purchaser is bound to see that there exists a legislative authority, not in conflict with the State Constitution.*"

The law which allows a public corporation to defend against its unauthorized contracts, also permits it to defend against actions on the case brought to recover damages for injuries to persons occasioned by defective works constructed by such corporation.

In the case of *Albany* v. *Cunliff*, it was held that the city could not be made liable in such an action unless it was shown that *the law imposed the duty or conferred the authority.*

The act relied on conferred the authority to erect the bridge, which occasioned the injury to the plaintiff. The city defended itself from liability on the ground that this act was void, *because not passed by two thirds of the legislature as required by the constitution.*" The judgment was in favor of the city.

In the opinion delivered by STRONG, J. it is said—"It is urged that the asent of the common council estopped the corporation from raising this objection. This would be true when the assent was given by *persons acting in their own behalf, and who have themselves to pay the damages.* But it is different with a corporation. If the common council could not under the circumstances bind the corporation expressly, *a fortiori they could not conclude them by way of estoppel.*" 2 Coms., 178.

We have said that the Supreme Court of the State had twice decided that the Act of 1857, recited in the bonds

as authority for their issue, was absolutely void and of no effect.

The case of *Ryan* v. *Lynch*, was a bill filed by the tax payers to enjoin the collection of taxes to pay the interest on the bonds now in suit. The injunction was granted, and on appeal to the Supreme Court the decree was affirmed on the sole ground that the act of 1857 was a nullity.

The court say, it is urged by counsel, that the defendants in error, as tax payers and residents of the town of Ottawa, *are* estopped from claiming that the bonds are void, because they have passed into the hands of innocent holders, and the town has paid interest on them. If the bonds are voidable merely, this is true, but if they are absolutely void, it is not."

The subsequent case of *Miller & Paddock* v. *Goodwin*, was also a bill filed by tax payers of the town of Auro. ra, to enjoin the collection of taxes to pay interest on bonds issued under this act.

The answer to this bill urges, in opposition to the injunction, all the grounds now urged in this court for the protection of the bond holders. The case was doubtless defended in the interest of the bond holders, though they were not technically parties on the record.

After setting forth all the facts necessary to show that the act was constitutionally passed; the answer avers—

That the bonds were put upon the market by the railroad company, as agents of the town, and sold in good faith for full value, without notice of any defect or irregularity.

That interest had been regularly paid, and $10,000 on the principal.

That the town has voted, at the annual meetings for the election of directors in, for said railroad company.

That the bonds were registered in the auditor's office.

Finally, the answer avers that if there was any defect in the act of 1857, the Bonds were made valid under the acts of 27th March and 20th April, 1869.

The injunction granted, this case was also taken to the Supreme Court, where the decree was affirmed. The doctrine of *Ryan* v. *Lynch* is repeated by the court. The act of 1857 is declared to be absolutely void. "It results (says the Court) that unauthorized contracts are void, and in actions thereon the corporation may successfully interpose the plea of *ultra vires, setting up in its defense its own want of power* under its charter, or constituent act, to enter into the contract."

Nothing can be more explicit and direct than these two decisions to establish the nullity of the act of 1857, the consequent invalidity of the bonds issued under it, and the right of the corporation, when sued on these bonds, to show these matters in any action brought to enforce them.

It is not necessary to vindicate the good faith of the Supreme Court of the State in annulling the act of 1857, on the grounds stated, but it may not be improper to say that in this they followed decisions repeated, through a long series, annulling acts for similar defects, long before the issue of these bonds.

Are these decisions obligatory on this court? This question was elaborately argued by me heretofore. I understand it to be now admitted that they are, and therefore I desist from any further remark on this head.

But while admitting this, it is said that these decisions were made in cases to enjoin the collection of taxes, *non constat*, the State Court would decide the same principles, where the bondholder was plaintiff and the town

the defendant, or that they would so decide when the innocent third party (the bondholder) was seeking to compel the levy of a tax to pay the interest.

If the decisions mean anything, they fix the status of the act and of the bonds; they declare them both to be absolutely void.

But they go further and reach the very question now before us, and declare "that in actions brought on the bonds the corporation may successfully interpose the plea of *ultra vires*, setting up in its defense its own want of power, &c."

We repeat, then, it is a mistake to say that the court has not decided "that in an action by the innocent holder this defense of want of authority cannot be made."

That an innocent party is the actor does not affect the question. This may be seen in the case of *People of Ill. Ex. Rel. Barnes* v. *The Treasurer*.

The Legislature, in 1863, passed an act appropriating money for the relief of the wounded soldiers of the State. Under this, the Governor contracted with Barnes, the owner of a steamboat, to bring home certain wounded men.

The services being duly performed, the account properly vouched, and a warrant issued by the auditor, demand of payment was made on the treasurer, who refused to pay.

Thereupon a mandamus was issued, Barnes, the innocent party, being the actor seeking payment for services performed under a statute having, as in this case, all the formalities of law, and regularly appearing among the public laws of the State. The State had received the full consideration of the services, and now the State

was asked to pay for the same. What was the defence made for the State? Solely this, that the "bill was never passed in the manner required by the express provisions of the constitution of the State."

The defect of the statute was the same that existed in the act of 1857, and the mandamus was dismissed.

As the decisions of the State Court were rendered in suits brought to enjoin the collection of taxes to pay the interest on the bonds, and not in actions to enforce the bonds, it is said that *we should wait until a similar decision is made in the latter case, before it is decided that such decision is binding on this court.*

We confess we see no reason in this, for if the status of the bonds, as declared in the cases before the State Court, has been determined, the same decision must be made in every case, without regard to parties or the form of action.

But, we may add, that such a course is not in harmony with the previous action of the Court in giving effect to State decisions.

In *Marshall* v. *Silleman*, 61 Ill., 218, a bill was filed by the tax payers to enjoin the collection of taxes, on the ground that the act under which the bonds were issued was unconstitutional, and the injunction was maintained by the Supreme Court.

This decision was repeated in another case, *Weley* v. *Silleman*, 62 Ill., 170.

In the case in this court of *Elmwood Township* v. *Marcy*, which was an action on the bonds, the invalidity of the bonds was declared upon the authority of the two cases cited, the court holding they were bound by the decis-

ions of the State Court, though made on bills ni equity, to enjoin the collection of taxes.

"We are not called upon (say the Court) to vindicate the decisions of the Supreme Court of Illinois in these cases, or approve the reasoning by which it reached its conclusions."

If the question before us had never been passed upon by it, some of my brethren who agree to this opinion might take a different view of them. *But are not these decisions binding on us in the present controversy?* They adjudge that the bonds are void, because the law which authorized their issue was in violation of a peculiar provision of the State Constitution. *We have* always followed the highest court of the State in its construction of its own constitution and laws. It is only when they have been construed differently at different times that in cases like this we have adopted, as a rule of action, the first decision and rejected the last; and this has been done on the ground that rights acquired on the strength of the former decisions ought not to be lost by a change of opinion in the court.

But when the construction has been fixed by an unbroken series of decisions, the courts of the United States accept and apply it in cases before them. If a different rule were observed, it is not difficult to see that great mischief would ensue."

92 U. S., 292.

The court did not wait in this case to adopt the decisions of the State Court, and we can see no ground in law or reason why they should wait in the case before us.

The doctrine of *ultra vires*, which frees public corporations from liability for unauthorized acts, is founded on

principles not at all influenced by the question of good faith or diligence on the part of those dealing with them.

However apparent may be the authority, however honest and diligent may be the party contracting with such corporation, if, upon a judicial determination, that apparent authority is determined not to confer the power, though both parties acted on the belief it did, obligation incurred under it is void, and the corporation freed from liability on it.

What the law is, is often very difficult to determine. Lawyers of eminence frequently contest the point, and laymen therefore cannot be supposed to have accurate knowledge of the subject.

Yet the principles of public policy establish the maxim *ignorantia legis neminem excusat.*

In the " Doctor and Student," it is affirmed that every man is bound at his peril to take knowledge what the law is, as well the law made by the statute, as the common law.

This rule is to the end, that practical good may be attained, rather than theoretical perfection. It seeks less to administer justice in all possible cases, than to furnish a standard which will secure it in the common course of human business.

There is a great deal of hardship in the rule which gives effect to statutes from the very day on which they are passed, when no other period is fixed upon by the statute itself.

Yet such statutes operate upon persons and property, in many cases when there is an utter impossibility that their existence should have been known.

Now let us suppose that an act authorized the town to issue the bonds; that this had been in long existence; that these bonds were executed and delivered in compliance with its provisions; but the day before they were executed, the legislature revoked the power to issue them, and that this revocation could not have been known to the parties.

By the rule which prevails in this country and in England—the revocation taking effect from the date of the act—would as completely have deprived the town of all authority, and as completely have invalidated the bonds, as if the passage of the act of revocation had been well known and understood at the time of the transaction.

The case we put is where there was a physical impossibility to know the law. In the case at bar, there was no such physical impossibility, for by the same means used by the court in the decided cases, the bond holders might have discovered the defect in the act of 1857.

In this connection it is proper to refer to the fact, that in the two cases in which the State Court held the nullity of the act of 1857, they also passed upon the competency and sufficiency of the evidence to establish it. This same character of evidence used in those cases was introduced in the trial of the case now before the court.

It is very true that every act of the legislature clothed with certain formalities is to be regarded *prima facie* valid.

But to hold that this *prima facie* case may not be rebutted when an action is brought on an agreement which depends upon the validity of the act, would be to free legislation from constitutional limitation.

Legg v. *Mayor of Annapolis*, Am. L. R., January 1877, p. 28.

The party who, in a judicial proceeding asserts the invalidity of such a statute cannot, by *mere suggestion*, invoke the judgment of the court on such a question. To overcome this *prima facie* case, he must introduce into the record of the case by proper pleading and evidence the facts which establish its invalidity.

This is all, we respectfully submit, that was decided in the case of *P. R. Co.* v. *Wren.*

In the Supreme Court, on appeal from the judgment of a Justice of the Peace, for the value of a cow killed by the engine of the company, it was for the first time suggested by counsel that the act under which the judgment had been rendered had not been constitutionally passed. The reply of the court was, "it is not our province, at the suggestion or request of counsel, to undertake to explore these journals. If counsel seek to raise the question, it is not sufficient to refer to the journal. *Let them make the requisite proof of that fact and introduce the proof into the record.* A duly authenticated copy of so much of the original as shows the facts relied on for impeaching a law *prima facie* valid must be brought before us through the record."

The same doctrine is announced in Larrison's case. (77 Ill., 18.) The act is *prima facie* valid, and stands "until the presumption is overcome by *legitimate proof.*"

This "legitimate proof" was offered in this case.

The Supreme Court of Maryland, in the case of Legg, (*supra*,) refer to a former decision which adopted the conclusion of this Court in Gardner vs. Collector, (6 Wall., 499,) in which it is held, that "whenever a question arises in a court of law as to the existence of a statute, or as to the time it took effect, or as to its precise terms, the Judges who are called upon to decide such questions, have the right to resort to any source of in-

formation, which in its nature is capable of conveying to the judicial mind a clear and satisfactory answer to such question; the best and most satisfactory evidence in all cases being required."

And the Maryland Court then adds: "If, then, it be true as alleged in the petition that the act in question never in fact passed both Houses, substantially as it was approved by the Governor, sealed with the grand seal and published, and that fact can be established by competent evidence, it follows that the act is a *nullity, and the Court would so have to declare it.*"

We then have no difficulty whatever in answering the question that has been proposed, can "this legitimate proof" be made to overcome the *prima facie* case of the validity of the act when the corporation is sued by the *bona fide* holder of its bonds?

We answer unhesitatingly it can—all the principles of law answer it can—the two decisions of *Wren* and *Larrison*, cited to show the act was *prima facie* valid, give the same answer, and we are at a loss to know on what doctrines, or by what course of reasoning any different response to the question could be given.

It is said, that as the parties acted on a statute *prima facie* valid, a subsequent decision declaring its invalidity cannot affect the transaction. That this does not present the question of *construction*, when each party, stands on an equal footing, and each can judge for himself, and when the mistake would be one of LAW. That the mistake here is "one of *fact.*"

Whatever may be the rule, if the present litigation was between individuals who have full power to enter into any agreement not forbidden by the law, we respectfully submit, there is nothing in the suggestion operative on

a case, where a corporation is the party possessing no power to contract, except under legislative authority.

It is needless to repeat what has already been said—that contracts, *ultra vires*, have no obligatory force. If the law did not confer the power, the act of the corporation cannot create the obligation. The decisions of this Court show that the holders of such Bonds must not only take notice that there is an act authorizing their issue, but see that such act "*is not in conflict with the State Constitution.*"

If the Bonds are void under the act of 1857, *have they been made valid by subsequent legislation?*

The two acts relied on, and which were the basis of the judgment of the Court below, are these—

First. The act 27 March, 1869, entitled an "act to amend an act, entitled an act to incorporate the Ottowa, Oswego, and Fox River Valley Railroad Company." (3 Vol. Private Laws, p. 329.)

Second. The act 20 April, 1869, entitled "an act to amend an act entitled an act authorizing certain cities, &c., to subscribe to the stock of certain Railroads, in force February 18, 1857."

It will be remembered that these Bonds were issued shortly after the date of these acts, and that the election which authorized their issue took place *two and a half years prior to their passage.* They are signed by the Supervisor and Town Clerk, and are executed *by virtue of the election of* 1866 *and the act of* 1857.

In construing statutes, we may safely assume two rules to be well settled :

First. That no retroactive effect is ever attributed to them without plain words compelling such construction.

Second. That the *intention* of the Legislature is to be diligently sought for, and when found is to govern the interpretation, when the terms of the act do not forbid it.

Was it, then, the intention of the Legislature, by these acts, to give validity to the election held in 1866, and so authorize the town officers to execute bonds without further consulting the will of the citizens?

It is rather remarkable that the counsel who represents this case, for the bondholders, and the counsel representing the same interest in the succeeding case (*County of Kendal* v. *Perkins*) should be in direct conflict on this vital question.

In the brief of Mr. Eldridge, heretofore filed, p. 14, he says: "The assumption that the Legislature were under a misapprehension as to the constitutionality of the act of 1857, cannot be entertained for a moment. That these acts must necessarily be considered as a declaration to the world, beyond all possible question, *that the act of* 1857 *was a valid act*, and entitled to full faith and credit."

If the act of 1857 was void, no subsequent legislation could make it valid.

The Supreme Court has declared its invalidity, and the legislative power is incapable of reversing this judgment.

A new act may refer to the void act for the purpose of curing its defects; but whatever obligations or rights may thus arise, will come wholly by force of the new act.

In opposition to Mr. Eldridge, is the proposition of Messrs. Hay, Greene, and Littler; at p. 26 of their brief

they say: "it was *not the intention* of the Legislature to give (these acts) a retroactive effect; we admit the Legislature *was ignorant of the supposed defects of the act of* 1857."

That this latter position is the correct one, admits of no doubt.

How else can we account for the fact that there is no expression in either of the acts, which either directly or by proper inference justifies any other conclusion.

Again, the parties themselves, the corporation and the bond holders, did not regard these acts as at all effecting their transaction; for, though the bonds were issued subsequently to these enactments, they were not all noticed, *while the act of* 1857 *is recited as the sole authority by virtue of which they were issued.*

The first of these acts, authorizes the town through which the new line of road was to run, to subscribe for stock on "*the terms and conditions*" presented in the act of 1857.

The second of these acts provides, that in addition to the cities, towns, counties, &c., authorized by the act of 1857, to subscribe for stock, "the following *portions* of cities, towns and counties, are authorized to subscribe in the manner provided for in said act, except as hereinafter provided for."

The 4th Section then provides—"that all bonds issued under this act, or to be hereafter issued under the act to which this is an amendment, may be issued in sums of from $100 to $1000."

Plainly, in the first act, the only object was to give to *portions* of cities, &c., the right to subscribe, previously confined to *entire* cities, &c., and in the latter act the sole object was to change the denomination of the bonds. The act of 1857 required the bonds to be for $1000 each,

and by this amendment they were authorized in sums from $100 to $1000.

These two acts, it is admitted, refer to the act of 1857, and provide for amendments. But these amendments are confined exclusively to the particular provisions above cited.

It is scarcely necessary to say that a mere reference to a void act for the purpose of changing certain conditions and limitations therein contained, no more gives validity to it than would a reference in a deed to a prior void conveyance for the purpose of description, evidence the intent of the grantor to affirm such conveyance.

The contention on the other side is, admitting that the act of 1857 was a nullity, and that therefore the majority who voted for subscriptions in 1866 had no power to bind the minority by such a vote. Yet the intended effect of these subsequent acts is to make it lawful for the officials of the town to issue these bonds without further approval by popular vote.

It would require very emphatic terms to induce the belief that the Legislature intended so great a departure from its policy and practice of leaving to the inhabitants of the town to decide for themselves the incurring of such indebtedness.

In the case of *Marshall* v. *Silleman*, 61 Ill., 219, the township of Bromfield was authorized to subscribe $35,000. An election was held and voted for that sum. Another election was held and voted $15,000 additional. As the latter was unauthorized, the Legislature, in April, 1869, passed an act, declaring the election for $15,000 " is hereby legalized and confirmed, and declared to be binding upon said township."

Subsequently bonds were issued under this act.

In passing upon the validity of this statute the Supreme Court say: "Before the passage of the act the subscription was not binding and could not be collected. If it is now binding it became so, for the first time at the passage of this law, and is so solely by force of the law."

Comparing then this law with the provisions of the constitution they say: "Our conclusion is that this curative act was a violation of the constitution. Its object was to compel the town to issue the bonds *independently of its own wishes*, and this was beyond the legislative power. It sought to accomplish this by declaring that a void proceeding was valid; that a vote *confessedly illegal was in fact legal.* But this vote was *an accomplished fact.*"

This decision is repeated in the case of bonds issued by the town of Elmwood. *Wiley* v. *Silleman*, 62 Ill., 170.

A suit was brought in the Circuit Court of the United States on some of these latter bonds, and on a certificate of division was sent to this court, where judgment was rendered in favor of the town on the authority of these decisions; the court holding them to be obligatory on the Federal judiciary.

What we insist on is that the act which purports to be an amendment of the act of 1857, does not give validity to it nor express the legislative intention to re-enact its provisions.

In New York, in 1849, an act was passed to establish free schools, but this was submitted to a vote of the people. On this ground it was held to be unconstitutional and void.

Before the commencement of the suit an act was passed constitutionally, which ratified the first act.

As to this, the Supreme Court say—"If the act, at the time it was passed, was void, we do not perceive how an

amendment of the act, unless made on some point *necessarily requiring the expression of the legislative will upon the expediency of the act itself, can be held to ratify it.*"

"The legislature in passing the act, with a provision to submit it to the vote of the people, assumed it was vested with a power, which we hold they do not possess. In amending the act, we have the right to suppose they still labored under the same impression. *They therefore only intended* to amend what they supposed to be a valid law of the land, and not to take the responsibility of re-enacting the law itself.

An amendment made under such circumstances cannot have the effect to make a void law valid."

But further, the Supreme Court of the State has itself passed upon the construction of these statutes as applied to the bonds in controversy.

In *Miller & Paddock* v. *Goodwin*, (*supra.*) the curative effect of these acts was strongly urged in the answer. But the court held, "the bill never became a law," that the "bonds were absolutely void," and that consequently "*no subsequent act or recognition of their validity* could so far give validity to them as to estop the tax payers from denying their legality."

On these considerations and authorities we submit the following propositions are well established:

First. That municipal corporations have no power to issue negotiable bonds without legislative authority.

Second. That without such authority the bonds are void, even in the hands of an innocent holder.

Third. That when such bonds are sued on, the corporation is not estopped from pleading their own want of authority.

Fourth. That it is not enough to give validity to the bonds, that there is an act of the Legislature authorizing

their issue. However apparent the authority, the bonds will be void if such act is unconstitutional.

Fifth. That the rule of *ultra vires*, as applicable to such corporations, is a fixed and arbitrary one, and the question of good faith and diligence of enquiry on the part of the bondholder, are not involved in its determination.

Sixth. That while acts of the Legislature clothed with the formalities of law are *prima facie* valid, yet, when by proper pleading and evidence the question of their constitutionality is raised, the courts are bound to decide it.

Seventh. That the highest court of the State having determined that the act of 1857 was unconstitutionally enacted, and that the corporation was not estopped from pleading the invalidity of the bonds—this is conclusive on the State courts, and fixes the status of the act and of the bonds.

Eighth. That while there are some decisions of other courts, holding that a constitutional provision requiring the yeas and nays on the passage of the bill, to be entered on the journal, to be directory only; yet the construction of the Supreme Court, that this provision in their State constitution was mandatory and affected the validity of the act, is not only binding on the State courts, but equally on the courts of the United States by virtue of the provision of the act of 1789, and the repeated adjudications of this court.

Ninth. That the acts of 1869, neither by express words nor by necessary implication, indicate any intention to re-enact the provisions of the act of 1857, and without this they produce no effect on the question at issue, and this is the express decision of the Supreme Court of the State.

The judgment should therefore be reversed.

P. PHILLIPS,
for Plaintiff in Error.

ADDENDUM.

Is the clause in the Constitution of the State requiring the yeas and nays on the passage of the bill, to be entered on the journal, directory merely ?

A similar provision is to be found in the Constitutions of New York, New Jersey, Ohio, California, and several other States, in some of which the clause is held to be directory only.

In enacting a fundamental law the purpose is to fix the boundary of power beyond which the legislature cannot pass.

As a general proposition therefore, provisions found in a Constitution should be construed as limitations, and not merely as directory.

The Constitution of the State not only requires the yeas and nays to be entered on the journals, but declares, in this connection, "And no bill shall become a law without the concurrence of a majority *of all the members elect in each house.*"

This latter inhibition is not to be found in the constitutions of several of the States, where the provision for entering the yeas and nays has been held to be merely directory.

We do not see what security there could possibly be against the passage of a bill by a *majority of those voting*, and thus violating the rule, that there must be a *majority of the members elect;* except by holding, as the State Court

does, that this provision in the constitution is a substantive thing, and in its nature *mandatory*.

Mr. COOLEY well says that courts tread on very dangerous ground when they venture to apply the rules which distinguish directory and mandatory statutes, to the provisions of a constitution.

After reviewing the decisions on the question before us, while admitting that there are some cases which hold that such a provision is directory merely, he says: "They are at variance with the weight of authority upon the precise points considered."

He refers to the expression of WILLARD, J., (*People* v. *Supervisors*, 8 N. Y., 328), that the requirement to enter on the journals the yeas and nays was directory," and says that it was an *obiter dictum*, as the case showed the provision had been fully complied with." He adds—

" Those familiar with the reasons which have induced the insertion of this clause in our constitutions will not readily concede that its sole design was to establish a new rule of order for legislative proceedings which might be followed or not at its discretion."

Con. Lim. p. 80.

Again, he cites the decisions of Illinois on this subject, and fully concurs in their doctrine, that " such directions are clearly imperative, and cannot be dispensed with by the legislature." p. 140.

Again—" Each House keeps a journal, which is a public record, and of which the Courts are at liberty to take judicial notice. If it should appear from these journals that any act did not receive the requisite majority, or that, in respect to it, the legislature did not follow any requirement of the Constitution, or that in any other respect the act was not constitutionally adopted, the courts may act upon this evidence and adjudge the statute void." p. 135.

To same effect is Sedgwick.—"It is settled that judges may, if they deem it necessary, look beyond the printed statute book and examine the original engrossed bills, and it seems that the journals of the two Houses may also be consulted."

Sedgw., Stat. and Con. Law, 2d Ed., § 55.

It is unnecessary to cite the numerous cases which have been decided in conformity with the views held by the Supreme Court of Illinois, or to endeavor to reconcile those which differ from them.

These decisions are based on the soundest principles of constitutional law, and sustained by the weightiest authorities.

4-260

SUPREME COURT OF THE UNITED STATES.

TOWN OF SOUTH OTTAWA,

vs.

NOAH PERKINS.

AND

BOARD OF SUPERVISORS OF KENDALL COUNTY,

vs.

AUGUSTUS T. POST.

BRIEF OF HAY, GREENE & LITTLER, IN REPLY TO PETITIONS FOR REHEARING.

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BRIEF OF HAY, GREENE & LITTLER, IN REPLY TO PETITIONS FOR REHEARING.

We deem it unnecessary, in view of the elaborate arguments heretofore filed in these cases, to trespass much farther upon the time and patience of the Court. The importance of the questions, as well as the amount involved, however, in our judgment will excuse some additional suggestions in the way of reply to the arguments of counsel in support of their application for rehearing.

The first question counsel puts to the Court, is: "Is a municipal "corporation, when sued by a bona-fide holder of its negotiable bonds, "estopped from pleading that the act under which they were issued is "unconstitutional and void?" In our original argument in this case, we attempted to show that under certain circumstances such corporations would be estopped from showing a want of authority, and we still ad-

here to these views. When a corporation, speaking through its proper officers, assumes the right to contract with third parties, and it is accredited with the powers which it assumes, and the other parties, relying upon this assumption of power, parts with his money and the corporation receives the money or the benefits arising from its expenditure, and aquieses in the contract so made by paying interest year after year on the money so borrowed, and continues to hold on to the money or the benefits arising from its expenditure, we understand in such case it will not be allowed to say that it had no power to contract in the first instance. Manifestly the rules of common honesty would require the corporation in such case at least to surrender the money or the benefits arising from its expenditure, before interposing such a dishonest defense. The authorities in support of our view on this question are referred to in our original brief and those of our associates, and your Honors are respectfully referred to them, and also to the brief of Messrs Wilson & Perry, in reply to petition for rehearing.

It is insisted with much earnestness, that this Court is bound by the adjudications of the Illinois Supreme Court, and this without regard to what your Honors might decide in the absence of such adjudication; and the dissenting opinion in this case substantially announces this doctrine. With great deference to the learned Justice who delivered the opinion and those who concurred with him, we insist that this doctrine has not heretofore been recognized by this Court. On the contrary, this Court, in an elaborate opinion delivered by Justice Clifford, in which the entire Court concurred, in the case of Supervisors vs. Schenk, 5th Wallace, 776, declared that questions relating to municipal bonds are questions of "*Commercial law* where the state adjudica-"tions, although entitled to great respect, do not furnish the rule of de-"cision in this Court." This case overruled in express terms a decision of the Illinois Supreme Court holding the bonds *void* for want of authority in the municipality to call the election recited on the face of

the bonds. This doctrine was first announced in Swift vs. Tyson, 16 Peters, page 1, and so far as we are advised has been steadily adhered to up to the present time. In the case of Pine Grove vs. Talcott, 19 Wallace, 666, the Court reaffirmed the doctrine, overruling in express terms two decisions of the Supreme Court of Michigan. We therefore assert that this Court has many times held, in the most unqualified terms, that in questions of the kind under discussion it would not be bound by the State Court decisions, and its decisions are almost if not entirely uniform on this point. We know of no case where this Court has followed the State Courts on questions relating to municipal bonds where the reasoning of such Court or its conclusions were not satisfactory to it.

However, for the purposes of this argument, let us admit that the Court is bound by the Illinois Supreme Court, and let us see whether we are not still entitled to recover. There is one general principle which all the Courts of this country adopt as the law in relation to this class of securities, viz.: Where they are in the hands of innocent purchasers before maturity for value, nothing short of a total want of power in their execution will render them void. This Court, and many of the state Courts, have decided again and again that a defective execution of the power would not avail as a defense, and we think this principle so well established that the citation of authority is unnecessary. It is also well established that a mis-recital of the power or a mistake as to the source of the power will not affect the instrument, if in fact the power existed. [Maher vs. City of Chicago, 38 Ill., 273.—Smith vs. Clark, 54 Mo., 71.] In the latter case, the bonds recited that they were issued under the act of 1855—which did not give the power; the holder proved that the act of 1857 did give the power, and the Court held them good, notwithstanding they purported to have been issued under the former act. Again, "where a corporation has power under *any circumstances* to issue negotiable securities, the decision of this Court is that

"the bona fide holder has a right to presume they were issued under the "circumstances which give the requisite authority, and they are no more "liable to be impeached for any infirmity in the hands of such holder "than any other commercial paper." [Supervisors vs. Schenk, 5 Wallace, 784.] And Dillon on Municipal Corporations, vol. 1, sec. 416, says the Supreme Court of the United States "has refused to be con- "cluded by the decisions of the state Courts against the validity of "such bonds, made after the bonds were issued—it has adopted when "necessary to protect the bona-fide holders of such securities *liberal* con- "structions of statutes and charters authorizing the creation of such "debts." Assuming now that the act of 1857, under which the bonds in suit were issued, was void and gave no power, and assuming further that the corporate authorities relied on it as their only source of power—we still say they are valid and binding obligations against the municipalities. Because the power authorizing their issue existed independent of the act of 1857. The second section of the act of March 27th, 1869, amending the railroad charter in aid of which the bonds were issued, reads as follows:

"That any city, county, town, or township near to or through "which said railroad is now or may hereafter be located is hereby au- "thorized to subscribe to the capital stock of said railroad, upon the "terms and conditions prescribed in an act entitled 'an act to author- "ize certain cities, counties, towns, and townships to subscribe to the "capital stock of certain railroads,' in force Feb. 18, 1857." We also claim there was power conferred to issue the bonds by the amendatory act of April 20th, 1869. Reference is made to our original brief, pages 3, 4, and 5, for the full text of these acts. Attention is called to the fact that both of these acts were passed long before the bonds were issued. It seems, therefore, that the question of power is no longer in this case, and the learned counsel must resort to some other pretext in order to furnish even a plausible reason against the validity of the bonds.

We call special attention to the fact that in neither of the cases decided by the Illinois Supreme Court, and upon which counsel rely, does it appear that the Court were ever referred to the acts of the legislature above mentioned, and we are therefore justified in stating that the question here made was not considered by said Court. It is fair to presume, in view of the rulings of the state Court on this question of power, that its decision would have been in support of the bonds had it been referred to the sources of power above mentioned, and this notwithstanding its holding as to the act of 1857. The learned Judge who tried this case in the Court below held that the amendatory acts mentioned gave ample power, and whether the bonds recited the power properly or not could make no difference, as the innocent holder had a right not only to rely upon the sources of power mentioned in the bonds, but upon any and all laws then in force; and this position we insist is supported as well by the authorities above mentioned as by the principles of natural reason and common honesty. We ask, upon what principle of law or justice will this Court say that we can not invoke the powers contained in said legislative acts? To deny us this right, the Court must overrule the doctrine announced in Supervisors vs. Schenk, super, and disregard the other authorities cited on this question.

The foregoing suggestions apply with equal force to both cases now on hearing. As to the case of Kendall County vs. Post, there is another element of power which we now call attention to, viz.: Section 77, Chapter 86, Gross' (Ill.) Statutes, which reads as follows, to-wit:

"Whenever the citizens of any city or county in this State are de-
"sirous that said city or county should subscribe for stock in any rail-
"road company already organized or incorporated or hereafter to be
"organized or incorporated under any law of this State, such city or
"county may and are hereby authorized to purchase or subscribe for
"shares of the capital stock of such company, in any sum not exceed-

"ing $100.000 for each of such cities or counties, and the stock so sub-"cribed for or purchased shall be under the control of the county Court "of the county or common council making such subscription or pur-"chase, in all respects as stock owned by individuals." The 78th section of said chapter authorizes the city or counties above mentioned, in payment of their subscriptions, to either borrow money or issue their bonds bearing not exceeding ten per cent. per annum interest. Under what pretext can it be argued that the bonds of Kendall County here in suit were issued without authority, even admitting the act of 1857 to be *void*. The law last quoted has been in force in our State since 1849, and county bonds issued thereunder have been held valid again and again by the Supreme Court of Illinois, as well as this Court. This court, at its present term, in the case of Post vs. Randolph County, held the bonds of said county valid which were issued on the authority of said law alone. The Kendall County bonds on their face recite that the election authorizing their issue was called and held "*as required by law, and the act aforesaid*," and thus it will be seen that we are authorized by the very face of the bonds to rely upon the act of 1849. If, therefore, your Honors should take the views insisted on, the bonds could be sustained without conflicting with the views of the Illinois Supreme Court as expressed in the two cases relied on by counsel.

The foregoing suggestions are submitted by Mr. Littler, who argued this case on the former hearing. In further support of the validity of the bonds in controversy, we invite your Honors' attention to the following:

A number of briefs have been filed on these cases and much argument heard. But the importance of the questions involved is so great that we have no doubt the Court will be willing to hear or read whatever may be said or written, and that may possibly throw light on the controversy.

If the law were so supernaturally wise that all its general rules

would be found applicable under all circumstances, and under every possible contingency, the administration of justice would be comparatively easy. But it so happens that the books which contain the law are filled in a greater degree with the enumeration of exceptions than with the declaration of rules.

Generalities are seldom absolutely reliable. When a case is brought within the very terms of some legal maxim, but half the work of the Judge is done, for he must then determine whether the case being brought within the limits of the rule, it does not also fall within the narrow limits of an exception.

The learned counsel for plaintiffs in error have striven hard to establish a principle which they regard as decisive of these cases. They have argued at great length, and cited many cases, to prove that a municipal corporation may set up the plea of *ultra vires* as against its own most solemn acts—that whatever the equities of the parties may be, or however shocking to all ideas of justice and common fairness, the defense thus presented must be held valid, and all considerations of good faith must give way.

That the plea of *ultra vires* may *generally* be set up by a municipal corporation, as against its own acts, we do not deny. The books contain many cases in which this rule is expressly declared, and we have no desire to controvert most of the cases cited by the learned counsel for the plaintiffs in error. But we submit that from the nature of the cases now presented, exceptions must be made in the application of the rule, and these cases fall within the exceptions. We are willing to admit that in most of the cases passed upon by the Courts the rule contended for by the learned counsel has been applied, and with sound reason. Indeed, it seems to us that in nearly all the adjudged cases it was absolutely necessary to insist upon and enforce the principle that a municipality might properly rely on the plea of *ultra vires*. For, if this were not so, no legal limitation on the power of municipal officers

would be of practical use. If it were held that such officers could enlarge their own powers by the simple process of going beyond them, and doing acts that would estopp their constituents, all legal restrictions would be valueless. If the commission of an act created the power to do it, or so operated as to preclude all enquiry into the existence of the power, then the most positive legal prohibitions would be overcome, and the people placed at the mercy of their agents.

This Court, and all others so far as we know, have repeatedly laid down such rules as were supposed sufficient to protect the people against any excess of power by their ministerial officers. It was held that whoever dealt with municipal agents was bound to enquire into the extent of their authority. No man was justified in relying on the mere assumption of power by a municipal officer, but all were required to look beyond. As to this, all authorities are agreed—and this is unquestionably right. It involves no injustice, for those instruments which create and define the power of such bodies are matters of public record, open to the inspection of all. If such instruments are of doubtful meaning it is the duty of whosoever intends to rely upon them to act cautiously, for to the Courts belongs all matters of construction and interpretation All men who assume to interpret these instruments for themselves must do so at their peril. To this extent the Courts have gone, but no farther. It was necessary to go this far for the protection of the public, and there was good reason for the settled principle.

But an effort is now made to carry the principle very much farther—to extend the rule far beyond its reason.

In the argument of Mr. Phillips, on the application for a re-hearing, he urges as a sound reason, the danger that exists of an abuse of power by public officers, and refers to some instances of such abuse in the District of Columbia. This argument would be very applicable if applied to an instance in which municipal officers had, by unwarranted construction of their own charter, exceeded their lawful powers. But

under the circumstances disclosed in the cases at bar, such an argument has no more application than a reference to a prevailing epidemic or a convulsion of nature. There is no question of *construction* before the Court. There was no attempt on the part of any officer to enlarge his own power by a false or strained interpretation of any charter. No abuse of authority is shown or hinted at calling for judical rebuke, or for the creation of new safe-guards. If the bonds in issue must fail, this result will arise from causes involving no more fault on one side, or merit on the other, than if an earthquake had produced it.

We have said that parties dealing with municipal officers are required to look beyond the assumption of authority by those officers. How much farther must they look? Is there any point short of absolute certainty at which they may rest, for the purposes of a mere *contract?* Or is it sufficient that they prosecute their enquiries as far as the most prudent men would do in dealing with the most important interests in life?

It must be conceded that the defendants in error did prosecute their enquiries as far as the people were required to do in ascertaining what laws they were bound to obey; as far as the Courts were required to go in determining what laws it was their duty to enforce against the liberties and lives of the citizens.

But we are told that all this was not enough—that defendants in error were required at their peril to know the law, and if the act in controversy was not passed with all due formalities it was not the law. The doctrine of *ultra vires* is invoked, and it is claimed that these cases are brought within that principle.

We think we have already shown that these cases do not fall within the reason of the rule contended for. If the reason fails the rule fails. And we think the current of authority justifies our conclusion. A rule prescribed for the furtherance of justice will not be extended

beyond the reasons on which it rests, merely for the purpose of defeating justice.

In discussing these cases, we do not think it necessary to enquire whether, if the act of the General Assembly now in controversy related to any of the ordinary subjects of legislation, any defect in its passage could possibly be cured. In the view we take of the law, the General Assembly did not act in its ordinary capacity. We desire to point out, what in our judgment is a very substantial distinction in this respect, having an important bearing on the question of the admissibility of the evidence, the exclusion of which, by the Court below, is now assigned as error. In doing this we shall state our understanding of the settled doctrine of this Court in a class of cases analogous to those at bar.

This Court has long since announced, and constantly adhered to the doctrine, that where power is conferred by law upon a municipality to pledge its credit in aid of some public improvement on condition that the majority of legal voters of the district shall, at an election properly called, vote in favor of such aid; and where particular officers are required to issue the bonds of the municipality in case an election is held with the required result, it will be adjudged in favor of innocent purchasers of such bonds, that the act of the proper officers in issuing those instruments, and reciting therein that all conditions precedent have been complied with, is conclusive and binding. It may be that the election was not properly conducted, or did not result as certified, or that no election was held at all. But this court considers that there must be somewhere a source of information on which the public may confidently rely as to this important fact, and that the certificate of those officers who are required by law to declare the result of such an election by acting upon it ought to be regarded as conclusive evidence. Such we understand to be the reasoning of the court in the leading Aspinwall case, and all that current of decisions which followed it.

Now, on what ground is it that the recitals made by municipal officers on the face of the bonds are held conclusive evidence of the facts therein stated, even against the truth? It is sometimes said that this conclusion is justified because the officers in making the recitals represent the people of their district, and being in law the statements of the people themselves, the latter are estopped to deny them. But this is not, and cannot be, a sound reason, for if the election has not resulted in an affirmative vote, the officers who certify have not been thereunto empowered by the people. If the power of making such a certificate is to be derived from the consent of the people, that consent must affirmatively appear before the right to certify arises. It is a jurisdictional fact, and must be shown. It will not do to say that power to certify arises from the result of the vote, and the result of the vote is established by the certificate; this would be reasoning in a circle.

In fact, the decision of the court in the Aspinwall case rests upon other and surer ground. The purchasers of municipal bonds are justified in relying on the recitals thereof, and on the fact of their issue, simply because the law has empowered particular officers to make such recitals, and to pass on all questions as to the performance of conditions, including the primary one on which their own authority depended. It is not merely as agents of the municipality that such officers act, but as ministers of the law. In believing that a proper election has been held with the requisite result, they are officers of the law, deriving their authority from the law and not from their local constituents. Did they depend for authority on the result of the popular vote, then the result of that vote would require to be shown before any of their acts was held binding on the people.

That the legislature is fully competent, or was fully competent under the constitution of 1848, to invest those officers with power to pass upon and certify the result of an election, and to bind the people by acting accordingly, cannot be denied. The Supreme Court held, under

that constitution, that the legislature might confer on municipal authorities the power to issue bonds without an election at all. Such was the declared law of the State when these bonds were issued. For a stronger reason, the legislature might confer on the same authorities power to hold an election and declare the result by acting upon it. In this view, the decision of this court in the Aspinwall cases and others of like character is fully justified. But if it be now held that because the Supreme Court of the State has changed its opinion this court must also change, then, so far as Illinois is concerned, the Aspinwall case is no longer authority. If municipal officers, acting under the clearest possible grant of power from the legislature, can not bind their municipalities except thereunto authorized by an election, then their recitals mean nothing till the result of such election be otherwise shown. But if the power to certify be derived from the law, the view of this court, so often expressed, is fully justified.

It may appear, at first sight, that the decision of these questions is not relevant to the present inquiry. We think it very relevant. We think the recent decisions of the Supreme Court of Illinois are in direct conflict with the Aspinwall case (of which that court had before approved) and with its own former rulings. And it is important in this: that the recent decisions, some of which are cited against us, proceed upon the idea that the legislature was not competent to invest municipal officers with special powers, except by and with popular approval expressed by a public vote. If these decisions be sound and binding, then the former decisions of the same court fall, and with them fall the doctrine of the Aspinwall case. For the latter case rests upon the power of the legislature to invest municipal officers with authority to bind the bodies they represent by passing upon questions of fact and so certifying the same that the world might rely thereon.

We now propose to apply this argument to the pending cases.

Let us suppose that the legislature of Illinois should determine to

engage in some great public work within the scope of its powers—to build a great highway by which the commerce of the State would be largely benefitted, and that to accomplish this end money should be borrowed on State bonds to be placed on the market. A bill is introduced stating this purpose in plain terms, and directing the executive officers to execute bonds and sell them to the highest bidder. The power to do this must exist unless denied by the constitution. Suppose such a bill, after passing through various stages, is signed by the speakers of both houses, engrossed, enrolled, approved by the Governor, published as law by the proper state officers; suppose it is twice amended by subsequent legislatures, the amendatory acts being so passed that their validity is not disputed; suppose the executive officers named in the bill, in pursuance of the terms thereof, issue bonds in the name of the State, sell the same in public market, apply the proceeds for the benefit of the State, suppose the bonds recite the passage of the law under which they are issued, and are purchased in good faith by persons who have no reason to question their validity. Would the State itself be permitted to repudiate these obligations, retaining the fruits thereof, on the ground that the original act had not been passed with due formality?

I do not ask this question from the stand-point of public honor or of common decency—if these be too high standards by which to measure municipal faith—but from the stand-point of the law. I know that the State could not be forced to plead in any court; but if it should proceed on its own behalf, or consent to submit itself to the test of legal morality, would such a defense avail? We say no. We contend that the State may do something more than legislate. Under the constitution it may contract—it may become a party to negotiable paper; and when it chooses so to do it must consent to accept all the incidents of that relation.

Whether such an act could be made valid by any lapse of time or public acquiescence, or by subsequent amendatory laws, if it were penal

in its character or related to the ordinary subjects of legislation, is not the question. The power in the legislature to authorize the making of such contracts being conceded, the absence of proper form in the passage of the act would involve only a defective execution of the power. And when the attempt to execute the power was shown, coupled with evidence of action by the State under it, and of assurance given on behalf of the State by its proper authorities that the act was the law, and of the purchase in good faith of the bonds by those who relied on such assurances, the State itself, sovereign as it is, would be estopped. There is not a shadow of reason for holding that a county is bound by the result of an election, certified by the proper officer, that may not with equal force be urged against the State.

True, in each instance the question of power may be raised. But the constitution bears the same relation to the state government that the statute bears to the municipality. In each case there may be a defective execution of the power, and in each the body politic may be bound by the authoritative declaration, as to any matter of fact, of the proper officers. The question is not so much "*did the fact occur?*" as "*did an officer thereunto empowered by law declare that the fact had occurred?*"

The passage of the statute, for all the purposes of a contract, was a question of fact—so much so, indeed, that in these cases we find the plaintiffs in error insisting that they had a right to try the question by plea like any other fact.

Yet we find that the constitution of 1848 required the legislature to provide for the publication of the laws. [Sec. 39, Art. 3.]

The statute of the State required the Secretary of State to make a careful comparison, and publish all laws with his certificate attached to the printed copies. [Rev. Stat. of 1845, chap. 84, secs. 5 & 7.] The evidence of the passage of the law now disputed was of so high a character that a copy thereof, certified by the Secretary of State, was not

only evidence within the bounds of Illinois, but, by the constitution of the United States, was entitled to full faith and credit as law anywhere throughout the Union. [Art. IV, sec. 1.]

Was this certificate such evidence that the defendants in error, residents of other states, had a right to rely upon it? Would it bind the State as to its own *contracts*, coming, as it did, from an officer of the State empowered by undisputed law to pass upon the question?

We submit that in such a case the law would hold the State to be as effectually estopped by its own acts as the poorest citizen within its limits. There was power in the government to do the act. There was power in the government also to declare to the world that the act had been done Having authority to make the State a party to negotiable paper, the various steps taken were matters of fact, with respect to which the State might estop itself as fully as a natural person.

We do not insist that a purchaser of such bonds would be justified in relying on any recitals thereon, as against any notice contained in the act of the General Assembly, or on the construction placed on such law by the state official. Such construction belongs to another power. But under such circumstances the state officers would be fully empowered, and indeed required, to determine whether such a law existed, and to act upon it; and upon that determination the world might rely.

The doctrine of the Aspinwall case would be fully applicable.

The question in such a case would not be whether all due formalities had been observed, but whether the law had empowered any public agent to pass on the question and to bind the State thereby.

We say again that if, under the constitution. the people have empowered the government to make the State a party to negotiable paper, they must be content to accept the consequences incident to such relation. The state government may do something more than legislate, within the ordinary meaning of that term.

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We say again that if, under the constitution. the people have empowered the government to make the State a party to negotiable paper, they must be content to accept the consequences incident to such relation. The state government may do something more than legislate, within the ordinary meaning of that term.

And in what respect do the bonds in controversy differ from bonds issued by the State? They were issued for a public purpose or they were utterly void, without regard to the statute. Such obligations have always been sustained solely on the ground that the object to be attained thereby was within the scope of the duties and powers of the government. To create or improve public highways is, and always has been, one of the duties of government, or the powers of taxation could not be invoked for that purpose.

Municipal corporations are only agents of the government for local purposes.

Mr. Cooley, in his work on Constitutional Limitations, page 211, says:

"The powers conferred upon municipalities must be construed with "reference to the object of their creation, namely: as agencies of the "State in local government. The State can create them for no other "purpose, and it can confer powers of government to no other end, "without at once coming in conflict with the constitutional maxim that "legislative power can not be delegated."

All the authorities are to the same effect.

It follows that the county of Kendall and the town of South Ottawa acted as agents of the government for local purposes in issuing the bonds. All the steps taken from beginning to end were parts of a single transaction, having for its object the accomplishment of a governmental purpose. There was power in the state government, by itself or its local agents, to do the thing supposed to have been done. The legislative and executive departments, in all that they did with the bill in its various stages; the Secretary of State who published and certified to it as the law; the people who voted in pursuance of it; and the municipal officers who issued the bonds on the faith of it; were all agents of the government engaged in executing a power con-

ceded to belong to the government. The act to be done was not less an act of government because accomplished by the co operation of local agents. If it be true that local officers may conclude their municipalities by passing judgment on the fact whether an election has been held, and that this power is derived from the statute which authorizes such officers to act on the result of the election, then it is also true that the municipality is also bound by the action of the Secretary of State in certifying that the law has been passed. The officers engaged are alike agents of the government. The thing to be done is within the scope of governmental duty. The power to act is found in the constitution. The question is not whether the law was originally so passed as to be valid for all purposes, but was it so passed or ratified as that the publication of it under state authority, coupled with such action under it as would be ample to estop a natural person, rendered it sufficient for the purposes of a contract. The Secretary of State, in publishing and certifying to the act as being the law, acted under authority not disputed. The passage of the act was a question of fact which, under the constitution, was submitted to his judgment in the first instance at least. It must be remembered that the state, by the concurrent action of its executive and legislative departments, had ratified the original grant of power by valid amendments, and this was done in view of decisions of the Supreme Court, which held in effect that such subsequent ratification was equivalent to an original grant of power for all the purposes of estoppel. [President of Keithsburg vs. Frick, 34 Ill., page 405.]

On the authority of the Aspinwall case, and like cases, we maintain that for all the purposes of binding the state, or any of its agencies, by the issue of negotiable paper, and in favor of innocent holders of such paper for value, the action of the Secretary of State is conclusive. The power of the government by itself or local agents to make the contract being conceded, the passage of the statute in due form is not more important than the holding of an election in due form. The

question is, did the statutes of the state empower a state officer to give assurance to the world that the act had passed? Did he give that assurance, and did the parties in interest part with their property on the faith of it?

These questions must be answered in the affirmative.

For these reasons, we say that such cases must be held to be exceptions to the rule of *ultra vires*. Public policy requires it. A due regard for the constitutional principle that full faith and credit shall be given to the public acts of each state, requires it. There are cases in which, for the sake of public morality, and of the maintainance of proper confidence in the records and authorized declarations of the state government, a limit should be placed to the investigation.

We have insisted that the facts here disclosed establish a necessity for declaring that there are exceptions to the application of the doctrine of *ultra vires*. If the books do not make this distinction, it is because such a state of facts as is here shown has seldom arisen. It ia time to assert the doctrine in the interest of public policy and public faith.

If the view we have taken of the law be sound, no difficulty can arise from what was *properly* decided by the Supreme Court of Illinois in Ryan vs. Lynch, and Miller & Paddock vs. Goodwin, so confidently cited against us.

It may be true that in a suit between a tax payer and a tax collector, the Courts will enjoin the collection of a tax resting solely on an act of the legislature not formally passed. The record of such a case presents no question properly except the regular enactment of the law. So far as the tax collector is concerned, his authority depends solely on what is written, and that construed strictly against him. But when the litigation is between the municipality and the holder of its paper, other questions are involved. The purchase of the paper for value before maturity; the absense of notice of defects; the ratification of the act

by the same power that originally attempted to pass it—in a word, the existence of equities which should bind the State and all its agencies are super-added to the naked question of the formal passage of the law. And the determination of the latter case in favor of the holder of the bonds does not necessarily conflict with the determination of the former case in favor of the tax payer.

The Supreme Court of the State has repeatedly recognized the general doctrine that a defense, good against a purchaser of municipal paper with notice of defects, is not good against one who has had no such notice.

Morgan County vs. Thomas, 76 Ill., p. 120.

It does not follow, therefore, that because a tax may be enjoined in a proceeding which does not show the existence of special equities, those equities will not be protected when shown. The *debt* may still be established by the parties in interest. This plain proposition is not to be over-thrown by the citation of cases wherein the real question was not properly in issue.

In the cases decided by the Supreme Court of Illinois, wherein the validity of these bonds was discussed, the present parties were not heard. They had no right to appear and show their special equities. One of the learned counsel for defendants in error says, on page 16 of his last brief: "Nominally these cases were between the tax-payers and the collector, but in substance the litigation was with the bond-holders."

Now, we contend that these cases were practically almost, if not quite, *ex-parte*. The collector was an officer dependent for his office on men who were contesting the tax. He had no substantial interest in the question. We do not know that the attention of the Court was even called to the amendatory laws which are here shown; for no reference is made to them in the opinions of the Court. The cases were between men who, in all human probability, were interested on the same

side, and in full sympathy with each other. There were the strongest reasons why the real parties in interest should have been before the Court, and adjudications as to theirs rights, made in their absence, can have little value.

Were it necessary for our present purpose, we would contend that even had the Supreme Court of the State passed directly upon the question in a case fully presenting it, this Court ought not to be bound thereby. That the laws of each state shall be taken as the rule of decision in cases arising thereunder, is not disputed. But it does not follow that this Court is compelled to accept the judgment of any other tribunal in existence as to what those laws really are.

The decisions of the State Court are indeed entitled to great weight and respect, but not to the extent of controlling this Court absolutely, in spite of its own clear convictions. If this principle be not conceded, the benefit of a great constitutional safeguard will be wholly lost. When large classes of men residing in a state suppose their rights or interests to be adverse to those of other men residing outside the state, they have to a great extant the power of determining in their own favor by the election of their own judges. This undue influence may be exercised without any intent on the part of the state courts to commit injustice. The judges may be selected because of their known opinions sincerely entertained. The influence of large bodies of men on courts elected by themselves, in controversies with those who have no voice in such election, is one of the dangers sought to be guarded against by the federal constitution. It is right that where the existence of a law, or the proper construction of it, is the very essence of the controversy, it shall be determined by a tribunal representing all the citizens of all the states.

The wrong sought to be guarded against by the constitutional provision which gives this court jurisdiction of such controversies, may be as fully perpetrated by holding that the decisions of the state courts are final with regard to the laws of the States, as by any means what-

ever. The whole dispute may, as in those cases, turn upon the question "what is the state law?" If the court be compelled to accept the decisions of the state courts without regard to its own judgment, then its jurisdiction in a most important class of cases is only imaginary.

But the state court has not decided this question. If the rights of non-residents of Illinois must be determined in accordance with whatever the courts of that State shall decide when properly presented, they are at least justified in insisting that until such decision is cited this court may apply its own judgment. They are not to be bound by the authority of cases practically *ex parte*.

We have only to add that if the Supreme Court of Illinois must be understood as having decided that under the constitution of 1848 the General Assembly could not, by subsequent legislation, ratify the unwarranted exercise of power to issue bonds by a municipal corporation, and hold that body estopped thereby, then that court has directly contradicted its own former rulings. Whether, under the doctrine laid down by this court in Gelpke vs. Dubuque, and never since departed from, this can be done, ought not to be a very difficult question.

We think all that has been said on the other side may be answered by three propositions:

First. If the act in controversy was not valid in the first instance, the necessary power was sufficiently granted under the valid amendments.

Second. There was power in the state government to do the act in dispute, by itself or its agents, and the defects complained of only related to the execution of that power.

Third. Such assurances were given to the world of the validity of the law, by the officers of the State thereunto fully empowered, as should estop the State and all its agents, general and local, so far as a mere con-

tract is concerned. Those assurances, coupled with subsequent ratification, long acquiescence, the receipt of full value, and the appropriation of the consideration paid, forbid that what was thus alleged and done should now be retracted and denied.

And lastly, we repeat that as to the Kendall county bonds, there was ample power in the general law to justify their issue.

Respectfully submitted.

HAY, GREENE & LITTLER,

of Counsel for Defendants in Error.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1876.

THE TOWN OF SOUTH OTTAWA, PLAINTIFF IN ERROR, —*vs.*— NOAH C. PERKINS, DEFENDANT IN ERROR.	No. 58.
BOARD OF SUPERVISORS OF KENDALL COUNTY, PLAINTIFF IN ERROR, —*vs.*— AUGUSTUS T. POST, DEFENDANT IN ERROR.	No. 59.

BRIEF ON RE-ARGUMENT, IN SUPPORT OF THE VALIDITY OF THE LAW UNDER WHICH THE BONDS IN QUESTION WERE ISSUED,

—BY—

ISAAC G. WILSON
AND
SANFORD B. PERRY.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.
1877.

ADDENDUM.

We respectfully ask the Court to consider the following proposition, as a part of our brief.

Article IV, Sec. 1, of the Constitution of the United States, provides that "full faith and credit shall be given "in each State, to the public acts * * * of every "other State."

Suppose a citizen of New York, finding the bonds in question for sale on the market, should examine the recitals therein. He finds there, that they are issued under and by virtue of the authority of a *public act* of the State of Illinois. He remembers the assurances repeatedly given him by this Court, that if the town has statute authority to issue the bonds, they are valid, and he may purchase them with safety. He has then only to ascertain the truth of the recitals in this particular. To do this, he sends to the Secretary of State for the State of Illinois, and receives from him a copy of the public act referred to in the bonds, duly certified under the hand of said officer, and of the "*Great Seal of the State of Illinois*," as it is called in Art. V, § 22 of its constitution. He examines this act, and finds in it ample authority to the town to do the acts declared in the bonds to have been done. Thus assured and fortified, he purchases the bonds.

Will not this Court, under the mandate of the Constitution of the United States, and under its uniform assurances to *bona fide* purchasers of this class of commercial paper, *require* that *full faith and credit* shall be given to this public act, and that the same, and all the rights in good faith acquired thereunder, shall be enforced?

WILSON & PERRY.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, A. D. 1876.

THE TOWN OF SOUTH OTTAWA, PLAINTIFF IN ERROR, —*vs.*— NOAH C. PERKINS, DEFENDANT IN ERROR.	No. 58.
BOARD OF SUPERVISORS OF KENDALL COUNTY, PLAINTIFF IN ERROR, —*vs.*— AUGUSTUS T. POST, DEFENDANT IN ERROR.	No. 59.

BRIEF ON RE-ARGUMENT, IN SUPPORT OF THE VALIDITY OF THE LAW UNDER WHICH THE BONDS IN QUESTION WERE ISSUED.

MAY IT PLEASE THE COURT:

We ask permission to file a brief on the re-argument of this cause, for the reason given upon the former hearing, that we are the attorneys for the plaintiffs in several judgments rendered in the Circuit Court of the United States, which, by arrangement, are to abide the determination of this cause.

An eminent American Judge, not long ago, characterized the defense of *ultra vires*, when set up by a town that

had executed its bonds and put them on the market under the authority of a law apparently valid, and where the bonds had been purchased by innocent parties for full value paid, as a "dishonest defense," that no court should tolerate. And it is worthy of note, that in a large majority of cases, counsel who represent such defenses feel constrained to preface their briefs with an apology.

The expression of the judge, and the apology of counsel, are but a tribute to that inherent and deep seated sense of justice which finds a place in every honest breast. A municipal corporation issues its bonds under the authority of the duly published laws of the State, which all parties at the time believe to be, and act upon as, valid enactments; it declares upon the face of the bonds that the faith and revenues of the municipality are sacredly pledged for their payment; it causes the bonds to be duly registered in the office of the Auditor of State, as provided by law, and they are sold in distant States to innocent purchasers for full value; the municipality receives the consideration; and then, retaining the proceeds, refuses to pay the debt, attempting to shield itself behind the merest technicality.

Was the language of the judge too strong? Such conduct in an *individual* would disgrace him in the eyes of all honorable men, and reduce him to the moral level of a common thief.

Is the same conduct any less reprehensible in a municipality than in an individual? A municipality is only an organized body of individuals. It acts through the instrumentality of thinking, sentient beings. Does dishonesty in an individual become honesty in an association of individuals? Were the guards which the statute creating a municipal corporation provided for the protection of the rights of the minority, also designed as machinery to aid the corporation in the perpetration of frauds? And are the same acts, the doing of which would estop an individ-

ual as being contrary to good faith and natural justice, to be taken as justifiable, or to be overlooked, when done by a municipality?

And yet the affirmative of these propositions is, in effect, the conclusion which Mr. Phillips, in his very able brief, presses the Court with so much zeal to adopt; and wholly ignoring the great underlying principle which should constitute the basis of all judicial action, the furtherance of justice, and an impartial application of the laws, asks your Honors to carry the rule of *ultra vires*, as a defense, beyond the limit hitherto reached by the Court, a limit already pushed too far, as we can but think, to subserve the ends of right and justice, or to satisfy the moral sense of the legal profession in this country.

A large space in Mr. Phillips' brief is devoted to a reference to the decisions of this Court, to the effect that municipal corporations have no authority to issue bonds in aid of the construction of railroads, unless it is conferred by legislative acts; and that bonds issued in the absence of this authority are void, even in the hands of *bona fide* holders.

It is not necessary to controvert these propositions as thus, in general terms, stated, nor to deny that the court has held, in cases where there was no pretense of statutory authority, that the bonds were void wherever found. The cases referred to in his brief may be divided into the following classes: (1.) In *Gelpcke* v. *Dubuque; Pendleton Co.* v. *Amy; Kenicott* v. *The Supervisors; St. Joseph Township* v. *Rogers*, and *Nugent* v. *The Supervisors*, there was full statute authority for the acts done. (2.) In *Floyd Acceptances; Marsh* v. *Fulton Co.; Thomas* v. *City of Richmond*, and *Police Jury* v. *Britton*, there was no statute authority, that is, no statute or act, constitutional or unconstitutional, from which authority could be derived.

It is believed that no case can be found, at least in the decisions of this Court, applying these rules or sustaining a defense based thereon, as against a *bona fide holder* of bonds, in a case where the acts of voting and issuing the bonds are based upon an act of the legislature *duly enrolled, signed by the speakers of both houses, approved by the Governor, deposited with the Secretary of State, and, under his authority, duly published as a law of the State, in full force.*

The plaintiffs in error are attempting to apply these rules to a case wholly different in principle from any to which they have heretofore been applied; and claim that this Court has erred in the decision already announced herein. They are asking this high tribunal to sanction and approve of dishonorable repudiation, by new and doubtful constructions of law.

If the Court feels bound by its past decisions to allow the defense of "want of authority," in cases like those cited in Mr. Phillips' brief, we most respectfully submit whether in reason and justice the rule ought to be further extended, as is sought by the town in this case? As already suggested, we believe that this line of defense has been pushed quite far enough. Let us consider for a moment where it leads to, and what are some of its consequences.

It leads to dishonest gains by the municipalities which repudiate their obligations; and it leads to cruel losses by those who have put faith in their acts by investing in their securities.

It destroys confidence alike in the integrity of public officers and of private citizens.

The people regard these defenses as dishonest and wicked, and when sustained, they lose confidence in the wisdom and justice, if not in the integrity, of judicial tribunals.

No amount of argument or of judicial determination can convince the common mind that there is any reason or justice in such a defense. The town takes the money of people who rely on its good faith, and gives its obligations to repay it with interest: obligations which are issued in strict conformity to a public statute of the State. Argument to such people in support of such a defense is sophistry. What satisfaction is it to a man, defrauded of his money by such a defense, to be told that there is a technical rule of law which prevents his recovery? He thinks courts are organized to administer *justice*, and not technicalities, especially when they *defeat* justice.

Mr. Phillips well remarks in his brief that the principal question decided in this case is one of great importance. He might have added that the entire subject of allowing the defense of *ultra vires* in these bond cases has come to be one of a most serious and alarming nature, as is shown by the records of this Court, and of the courts of many of the States. The people of vast numbers of municipalities in the Western States, in order to establish means of intercommunication, and secure access to the great markets of the country, and thus add to the value of their lands, have voted aid to induce the construction of railroads, and issued their bonds to be put on the market and sold, mainly in the Eastern States, for that purpose. Over $100,000,000 of dollars have been invested in these bonds, no inconsiderable per centage of which has been the money of women and children. In some instances it has constituted their all. The roads have been built with this money. The increased value given to the lands, where the roads have been constructed, is almost beyond computation. All over these western prairies, lands which, without access to a railroad, had been hardly worth the price of entry, suddenly became worth ten, twenty and thirty dollars per acre. An acre in the interior of Illinois or Iowa would bring as much as an acre within sound of

the waters of Lake Michigan. Farmers who had been struggling for years for the bare necessaries of life, and were scarcely able to get money enough to pay their taxes, suddenly found themselves men of substance. In short, the whole country jumped into wealth almost at a bound. It is safe to affirm that the building of railroads in the West has added more to her material wealth, and the wealth of her citizens individually, by tenfold, than all other agencies combined. And it was the money obtained by the sale of the bonds in suit, and others like them, that built the roads, or contributed largely to that end; and these are the bonds, the payment of which this, and other towns similarly situated, would repudiate.

II.

It has been, and may again be, claimed in this case, that this Court is bound to follow the cases of *Ryan* v. *Lynch* and *Miller* v. *Goodwin*, decided by the Supreme Court of Illinois.

That might, perhaps, be so if the decision of the State court was upon the *construction* of the act of 1857, or of the State Constitution, *but that is not the issue.* The question raised by the town is as to the *existence* of the act of 1857, under which the bonds were voted and issued. This is clearly a question of fact and not of construction, and is so treated by all the courts. The inharmony of judicial decision upon this question arises solely as to what proof shall be held *conclusive* of this fact.

Questions of fact belong to the realm of general jurisprudence, and the decisions of State Courts are not binding on the Federal Courts. If this case was before the Supreme Court of New York, New Jersey, Connecticut, Maryland, Iowa, Indiana, Missouri, North Carolina or

Louisiana, as is shown in our former brief, the decision would be, that the enrolled law is the *ultimate* evidence of its due and constitutional enactment. The weight of both reason and authority sustain this as the only rule which tends to ensure safety and justice.

But the Supreme Court of Illinois hold that it is competent, under proper pleadings, to go behind the enrolled law, and by legitimate proof, show that the law was not duly and constitutionally enacted.

We submit, that we might, with entire propriety, have urged the Court on the former hearing, and that we may now urge the Court, to settle this case upon the broad and wholesome rule established by the above named nine States. There is no reason, which occurs to us, why this Court, if satisfied of the propriety and reasonableness of the rule in force in so many of the leading States, should not adopt it as a part of the jurisprudence of this Court. It is not bound to follow the decision of the Supreme Court of Illinois upon the question of fact arising on the issue made in this case, any more than it is bound to follow it in any other case where an issue of fact, only, is made. The case at bar presents most controlling reasons, we submit, of the wisdom of adopting the rule, that the enrolled law is the ultimate evidence of its own existence. Under such a rule, all parties, by proper examination, may ascertain conclusively what the statute law of a State is. The question at issue in this cause could not then arise. The fraud attempted could not hope for success, and people could feel assured that the *faith* of the town, pledged in these bonds, *would be kept*, and if not kept, *would be enforced.*

In our former brief we only asked, what then seemed sufficient for the purposes of this case, that the Court hold this to be the rule as to *non-residents* of the State enacting the law. We now most earnestly urge the Court to consider this question upon the authorities previously cited by

us, and end it, so far as the Federal Courts are concerned, by adopting the just, safe, and reasonable rule above stated.

There are several cases in this Court which sustain the proposition, that the Federal Courts are not bound by the decision of the State Courts on questions like that raised in this case.

In *Township of Pine Grove* v. *Talcott*, 19 Wall., 677, the Court say :

It is insisted that the invalidity of the statute has been determined by two judgments of the Supreme Court of Michigan, and that we are bound to follow those adjudications. * * The question before us belongs to the domain of general jurisprudence. In this class of cases, this Court is not bound by the judgment of the courts of the States where the cases arise. It must hear and determine for itself. Here commercial securities are involved. * * Were we to yield, in cases like this, to the authority of the decisions of the courts of the respective States, we should abdicate the performance of one of the most important duties with which this tribunal is charged, and disappoint the wise and salutary policy of the framers of the Constitution in providing for the creation of an independent Federal judiciary. The exercise of our appellate jurisdiction would be but a solemn mockery.

In *Town of Venice* v. *Murdock*, 92 U. S. Rep., 499, there was a statute authorizing the town authorities to borrow money to aid in the construction of a railroad, and execute the bonds of the town therefor, provided they first obtained the written assent of two-thirds of the resident tax-payers of the town, and filed the same in the clerk's office of the county, together with the affidavit of at least two of the officers designated, to the effect that the persons giving their written assent composed two-thirds of the resident tax-payers of the town. A paper purporting to be the written assent of the proper number of resident tax-payers, to which was attached the re-

quisite affidavit, was duly filed as required. The bonds were issued under that authority.

The Supreme Court of New York, in a suit by a bondholder against the town, on bonds issued under the above authority, held that the burden was on the bondholder to show that two-thirds of the resident tax-payers had given their written assent, &c.

It was insisted that this was a judicial construction of a statute of that State by its highest court, and so furnished a rule by which the Federal courts must be guided.

But this Court held that it was not even an *attempt at interpretation;* that it was but the assertion of a general proposition; that in the case stated the burden of proof is on the bondholder; and the Court adds: "There is, "therefore, before us, no such case of the construction of a "State statute, by State courts, as requires us to yield our "own convictions of the right, and blindly follow the lead "of others, eminent as we freely concede they are." This Court held, that the recitals in the bonds, to the effect that the written assent of two-thirds of the resident tax payers of the town had been obtained, and filed with the county clerk, was conclusive of the fact in a suit by a *bona fide* holder of the bonds, and that he was not bound to prove that the requisite number of taxables had given their assent.

There are numerous cases familiar to this Court, in which State Courts have held bonds of this character invalid, because the towns had defectively executed the authority given to issue the bonds, and yet this Court, in that class of cases, has uniformly held the same bonds valid, in the hands of *bona fide* holders.

III.

The brief of Mr. Phillips states certain propositions, alleging that they are *admitted*, and then draws from them the conclusion that the Court has *erred* in the decision of this case.

His first proposition is, "that it is admitted that the act "under which these bonds were issued has been pro- "nounced to be *void*, for want of constitutional require- "ment, by the repeated adjudication of the Supreme "Court of the State."

We do not know by whom this proposition, in its application to *this* case, has been admitted. Certainly not by the counsel representing the bondholders.

It is admited just this far, and no farther, that the Supreme Court of Illinois, in *Spangler* v. *Jacoby*, affirmed in *Miller* v. *Goodwin*, decided that it is competent to go behind an enrolled law, and by legitimate proof show that in its enactment the Legislature did not observe all the requirements of the Constitution. And it is also to be considered, that the same court, in other cases, has held that such a law is *prima facie* valid, and can only be impeached by legitimate proof introduced into the record.

It is also admitted that in *Ryan* v. *Lynch*, a suit by a tax-payer of a town against the collector of the same town, to restrain the collection of a tax levied to pay the interest on bonds issued under the authority of the law in question, a suit made up, prosecuted and defended (!) by and solely in the interest of the town, the Supreme Court of Illinois, on the interests there represented, and upon the evidence there produced, held that the law in question had never been constitutionally enacted.

It is, however, trifling with the rights and interests of the bondholders to assert that their rights were either repre-

sented, properly considered, or lawfully adjudicated upon, in either *Ryan* v. *Lynch* or *Miller* v. *Goodwin*. And whatever the court said in those cases about their rights, is wholly extra-judicial, and does not bind anybody — not even that court.

We presented to the Court, in our former brief, the true character of the evidence relied on in those cases, and admitted by the town in its double capacity of complainant and defendant, and are satisfied that this Court could never hold it to come near enough to the quality of *legitimate proof* to raise even a *doubt* against the due enactment of the law.

It is not admitted, because it is not true, that the Supreme Court of Illinois, in any case upon any issue made between the proper parties in interest, and represented by counsel of their own selecting, has ever held that a municipal corporation which has issued its bonds upon the authority of the act in question, and put them upon the market as commercial paper, can show, *as against a bona fide holder* of such bonds, for the purpose of defeating a recovery thereon, that the act had never, in fact, been constitutionally passed by the Legislature.

And when the opinion of the Court states that "the "courts of the State of Illinois have not as yet, so far as "we have been able to ascertain, answered this question "directly," it states the fact precisely as it is, and there is no ground for the suggestion contained in the brief, that "the majority of the court has fallen into an error of fact." It cannot be shown by any fair analysis of the two Illinois cases cited, "that an innocent third party cannot compel a "levy of the tax;" and it is not possible to show by any published decision of the Illinois Supreme Court that it has ever so decided.

The Supreme Court of Illinois declares, as the opinion truly states, that it takes *judicial notice* of all acts of the

Legislature, signed by the Governor, and found in the office of the Secretary of State, *as laws in force.*

If the Supreme Court of Illinois is bound to take judicial notice of these acts as laws in force, ought that right to be denied to the bondholders? If the bondholders have taken notice of the act in question as a law in force, and in good faith acted upon it and acquired vested rights thereunder, shall they not be protected?

Mr. Phillips asks how the doctrine of estoppel, as applied by the Court in its decision of this case, can be reconciled with the doctrine that the holders of bonds are affected with notice of the alleged want of authority to issue them?

This depends upon how far the bondholders are affected with notice of the alleged want of authority.

There is nothing in the case that can be construed as giving them any actual or implied notice of want of authority. There was nothing which even the Supreme Court of Illinois treats as notice. There was an act of the Legislature duly certified by the speakers of both houses, approved by the Governor, and deposited with the Secretary of State; an act which the Supreme Court of Illinois declares itself bound to treat and recognize *as a law in force;* an act which that Court *presumes* to be a valid law; an act which gives not the slightest notice to that Court, or to anybody else of any inherent defects; an act which, even by the rules of that Court, cannot be impugned, except upon an issue of fact duly made in a suit pending, and sustained by legitimate proof; the burden being on him who alleges against the act.

Is it not destructive of all right and justice, and of all confidence in commercial transactions, to say that such a law bearing every indicia of due enactment, gave the bondholders *notice* that the act was invalid and conferred no authority?

To aid a defense as unconscionable as that here made, the Court will not extend the doctrine of implied notice beyond the absolute requirements of law and reason.

If it is held that such a law gave no notice to the bondholders, any more than it did to the courts, of its own invalidity, then there is no difficulty in reconciling the doctrine of estoppel, as applied by the court in this case, with the other rule that in certain cases the bondholders are affected with notice of want of authority.

The bondholders had neither actual nor constructive notice of any want of authority to issue the bonds in question, and therefore, without violating any rule of law held by this Court, they may insist that the municipalities are estopped from setting up "want of authority" as a defense.

If there had been *no* legislative act giving authority, then, upon the cases cited, the rule of want of authority, and the notice implied thereby, would be a defense to the bonds in the hands of everybody.

If the act upon which the authority is predicated was prohibited by the Constitution, then, under the same authorities, the same consequences would follow. Why in that case and not in the case at bar? Plainly because the courts declare an act unconstitutional by reason of *what appears on the face of the act itself*, and hold that every person is bound to take notice of such defects. It would be monstrous to hold that where an act is *prima facie* valid, and the courts bound to take judicial notice of it as a law in force, that a person while acting upon it, is bound also to take notice, that, at *some time*, on some *issue of fact*, made up in a suit to which he is *not* a party, the court *may* find and determine that *some* of the constitutional requirements were not observed in its enactment, and therefore the law is void, and all his rights based thereon of no value.

IV.

The doctrine of *estoppel*, as applied to municipal corporations, is not a new one. In proper cases, it is as well settled as a part of the jurisprudence of this Court, as anything else.

Before discussing the application of that doctrine to this case, let us see just what the case is, and just what the court has in fact already passed upon.

In 1857, an act purporting to have been duly passed by the Legislature of Illinois, signed by the speakers of both houses and approved by the governor, was deposited with the Secretary of State as a law, and by him, in obedience to a law of that State, published to the world, with other acts of the legislature passed at the same session, as a law of that State, in full force.

This act was acquiesced in, as a law in full force, by the people of that State, for thirteen years; it was acted upon as a law in force by the town when it voted to issue the bonds in question; it was recognized as a valid enactment by the same legislature in two subsequent acts, passed before the bonds were issued; it was acted upon by the officers of the town as a valid law when, in pursuance of the vote of the town, and without objection from a single tax-payer in it, they issued the bonds; it was declared by the recitals in the bonds to be a law, and so the basis of full authority ; and it was afterwards again acted upon by the town as a law in force, when it levied and collected a tax to pay the interest upon the bonds so issued, and paid the same; and still again, when it levied and attempted to collect further taxes for the same purpose.

This Court has decided that under *these* circumstances, and as against a *bona fide* holder of *such* bonds, the town is *estopped* from asserting the non-existence of the law under which it has issued its bonds.

It is this decision, made upon such a case, that the Court is asked to review and reverse.

If it is a question of authority, the bondholder shows the authority to issue the bonds by simply producing the act of 1857. The town answers it is true that there *appears* to be such an act, but that in point of fact there is not, because it was not constitutionally passed, and declares that this can be shown by evidence outside of the act itself.

It is not denied by the town that *prima facie* there is ample authority for the issuing of the bonds. If, for any reason, the town cannot go behind this authority, and by evidence impeach and overthrow it, then the bonds must be paid.

We have insisted that this *prima facie* authority ought of itself, to be held conclusive, because the only safe, just and wise rule is to hold the enrolled law the *ultimate evidence of its own existence.*

We also further submit, in accordance with the decision of the court already rendered in this cause, that the town is estopped by its acts, and by the facts in this case, from denying the authority given by the act in question. And we may be permitted here to say, that the appeal contained in the brief for protection to the helpless *minority*, might be worthy of more attention, but for one or two considerations which bear equally upon the question of hardship and the question of estoppel. The first of these is, that a very considerable time elapsed after the bonds were voted before they were issued, and there was a court of competent jurisdiction, open at all times for the purposes of injunction, while these bonds were being prepared and put upon the market, to which this minority could have applied and prevented the alleged fraud about to be perpetrated upon them. The second is, that the railroad was duly completed, and this aggrieved minority, as well as all other tax-payers of the town, received the full benefits of the

greatly enhanced value of their property, exceeding in amount many times the amount of the bonds issued, and every single person whose rights were thus overridden by the relentless majority submitted meekly until he had secured benefits which he would not exchange for tenfold the amount he would be taxed to pay the bonds, *before* any attempt was made to invoke the aid of the courts for protection. They waited until the bonds were scattered over the land, and had been purchased by the scanty accumulations of widows and minor children, before setting up this defense. Does an appeal for *protection* come with a shining grace from persons whose own *laches* and cunning have induced others to part with their money, only to lose it entirely, if the iniquitous and dishonest defense set up in this case is to prevail?

Viewed in any aspect, it would seem as if language was inadequate to properly characterise a defense like the one here contended for.

The cases are numerous where municipal authorities have so imperfectly executed the power given them, as almost if not wholly to ignore it, and yet they are held estopped, as against *bona fide* holders of their bonds, from setting up this defective and irregular execution of the power, as a defense to the bonds.

If it was the duty of the purchaser of these bonds to know that the act under which, by their recitals, they are declared to be issued, was not a law in force, it was certainly no less the duty of the tax-payers of the town acting thereunder to know the same fact, and knowing it, to have gone into the courts and enjoined the issuing of the bonds, or else ever after to recognize the obligations which they either actively or passively aided in placing upon the market.

There are several cases in this Court which hold clearly

the principles of law upon which we base the claim of estoppel in this case.

In *Marsh* v. *Fulton Co.*, 10 Wall., 684, Mr. Justice FIELD says:

> The obligation to do justice rests upon all persons, natural and *artificial;* and if a county obtains the money or property of others without authority, the law, *independent of any statute*, will compel restitution or compensation.

In *County of Moultrie* v. *Savings Bank*, 92 U. S. Rep., 631—the bonds issued recited that they are issued in pursuance of the subscription of the sum of $80,000 to the capital stock of the D. S. & M. R'y Co., made by the Board of Supervisors of said Moultrie County in *December, A. D.* 1869, &c. The county undertook to set up, as a defense to these bonds in the hands of a *bona fide* holder, that the subscription to the capital stock aforesaid was not in fact made until *after* the 2d day of July, 1870, the day when the constitutional provision prohibiting such subscriptions went into effect. The Court say:

> How can the county be permitted to set up against a *bona fide* holder of the bonds, that the *authority* to make the subscription, with all its legitimate consequences, had expired before the subscription was made, in face of the recitals and of the county record? Whether it had expired *was a matter of fact*, not of law; and it was peculiarly, if not exclusively, within the knowledge of the Board of Supervisors. After having assured a purchaser that their subscription was made in December, 1869, when they had power to make it, *it would be tolerating a fraud* to permit the county to set up, when called upon for payment, that it was not made until after 2d July, 1870, when their authority expired.

The principle which we contend for in the case at bar, is here most forcibly, most justly and most grandly declared. Supposing the county could have shown, as a matter of fact, that the subscription was not made until after the authority expired? Then it would have clearly appeared that the bonds were issued without authority. The

town contends here, that upon the authority of the cases cited in the brief, the bonds in such a case would not only be void in everybody's hands, as having been issued without authority, but would be affected with *notice* of the want of authority.

The case last cited shows that this rule is not of universal application; that there may be recitals in a bond that preclude the inquiry *even into the fact of authority to issue them*—recitals that it would be fraudulent to contradict.

Apply this rule to the case at bar. The bonds recite, as a fact, that they are issued "under and by virtue of a cer-"tain act of the Legislature of said State of Illinois, ap-"proved February 18th, 1857, entitled 'An act authoriz-"'ing certain cities, counties, incorporated towns and "'townships, to subscribe to the stock of certain railroads,' "the said act having special reference to the said Ottawa, "Oswego and Fox River Valley Railroad Company."

The existence of this act is a question of fact which could and should be as well known to the town acting under it, as to any other persons. The bonds recite, as a matter of fact, that there is such an act of the Legislature. After having assured a purchaser that there is such an act of the Legislature of Illinois, which is a law in force, and under which they are acting, would it not be *tolerating* a *fraud* to permit the town to set up, when called upon for payment, that, as a matter of fact, there was no such act? Is not the town estopped from setting up such a defense?

Let the principle that the courts will not tolerate a fraud in a municipal corporation any more than in an individual, be proclaimed unequivocally as a general rule of jurisprudence, and it will give great assurance to the public that the courts are established for the purpose of enforcing justice; and it will also give assurance to these municipalities, which, after having received enormous benefits from the public improvements aided by the bonds issued, are

now endeavoring to repudiate their obligations, that this Court, at least, will not tolerate their attempted frauds.

The brief declares, as an inducement to the Court to consider favorably the defense set up, that the town has never received any consideration from the railroad company for the bonds, except valueless stock.

Let the Supreme Court of Illinois be heard as to what the towns have received as a consideration for these railroad aid bonds.

In *Railroad Co.* v. *Smith*, 62 Ills., 274, the Court says:

The benefits resulting to the people of the State from our system of railroads, are untold and incalculable. The mind can scarcely grasp them. Railroads have almost superseded all other means of inter-communication between the several parts of our extensive and growing State. They have become an absolute necessity, indispensable to our increased growth, and to the removal of our immense surplus. They have added millions to our taxable property; given augmented facilities to every department of trade; enriched the masses of the people; largely enhanced the value of our lands; built up manufactures, and brought us into close proximity with the best markets of the country.

We desire to call the attention of Mr. Justice BRADLEY, whose instructive opinions we always read with great profit, to a difficulty which he fears will result from the decison of the Court as rendered, and which he expresses as follows:

In the case before us, our decision has no binding effect on the State Courts, and the spectacle is presented of two different tribunals, having co-ordinate jurisdiction in the same State, differing as to the * * existence of a law of that State, without any power to arbitrate between them.

With great deference to the learned judge, we submit that this is not a new, or even an uncommon spectacle. It is occurring, in principle, constantly. It occurs in every case where a question is decided differently by the two

classes of Courts, Federal and State. It occurred in *Township of Pine Grove* v. *Talcott*, and in *Town of Venice* v. *Murdock*, in which latter decision his Honor concurred, and it occurs in every case where this Court differs with the State Courts on the validity of municipal bonds.

In *Gelpcke* v. *City of Dubuque*, 1 Wall., 206, the Court say:

We are not unmindful of the importance of uniformity in the decisions of this Court and those of the highest local courts, giving *construction* to the laws and constitutions of their own States. It is the settled rule of this Court, in such cases, to follow the decisions of the State Courts. *But*, there have been heretofore in the judicial history of this Court, as doubtless there will be hereafter, many exceptional cases. *We shall never immolate truth, justice and the law, because a State tribunal has erected the altar and decreed the sacrifice.*

The opinion delivered in the case at bar declares that if the law in question is *prima facie* valid; if the courts of Illinois are bound to take notice of it as *a law in force;* if it is no part of the duty of the courts to explore the legislative journals for the purpose of ascertaining the manner in which a law, duly certified, went through the legislature, before deciding that a *prima facie* law is a law in fact, then it could be no part of the duty of the plaintiff to make this exploration before purchasing, in the open market, commercial paper issued and put in circulation upon the faith of such a law.

We submit that this proposition is founded on reason and justice, and is absolutely unassailable.

" Is the purchaser of such paper bound to know more " of the public law which governs his transactions than " the Court that must pass upon his rights when disputes " are to be settled? And if not, can one who borrows " money upon the faith of such a law, keep the money and " refuse to pay the lender, because, upon further investiga-

" tion, he finds the fact to be that the law was never " passed ? "

These significant questions are asked by the Chief Justice. They are based upon and well answered by the preceding proposition, and the answers are true, for the reason stated by the Court, "*that the law estops* the party from " asserting the falsehood of that which appears to be " true." And the Court might well have gone further, and added that the law estops the party from asserting the falsehood of that which he has solemnly *declared* to be true.

The Court, referring to the course of its decisions on this subject of estoppel, and recognizing its rule that the purchaser of this class of commercial paper is bound to see whether or not there was statute authority to issue it, declares that the purchasers of these bonds were bound to read the statute under which they were issued, but they were not bound to do more. Finding it upon the statute book, apparently in force, they had the right to infer that it was actually in force, and to govern themselves accordingly.

We submit that any other rule of law would be subversive of right and justice, and of the jurisprudence of this Court as established by a long series of decisions in which there is no conflict, and which vigorously uphold, maintain and enforce a great principle of commercial honor, of the highest importance to the country, and to no part of it more than to the noble and prosperous State of Illinois.

ISAAC G. WILSON,
SANFORD B. PERRY.

Supreme Court of the United States,

OCTOBER TERM, 1876.

THE TOWN OF SOUTH OTTAWA,

PLAINTIFF IN ERROR,

VS.

NOAH C. PERKINS,

DEFENDANT IN ERROR.

SUPPLEMENTAL BRIEF ON PART OF DEFENDANT IN ERROR, ON RE-ARGUMENT,

— BY —

G. S. ELDREDGE,

For Defendant in Error.

OTTAWA, ILL.:
REPUBLICAN STEAM BOOK AND JOB PRINTING HOUSE.
1877.

Supreme Court of the United States

THE TOWN OF SOUTH OTTAWA

vs.

NOAH C. PERKINS.

In Error to the Circuit Court of the United States for the Northern District of Illinois.

SUPPLEMENTAL BRIEF ON RE-ARGUMENT.

By far the larger portion of the briefs filed in this case by counsel for plaintiff in error, in support of the motion for a re-hearing, are devoted, (1) to the establishment of the proposition that negotiable instruments issued by municipal corporations in aid of railroads without legislative authority are void; and, being so issued, a *bona fide* holder of such obligations can acquire no right to enforce their collection, and that (2) the corporation cannot be estopped from denying its authority to execute such instruments as against such *bona fide* holder. Hence it is insisted that the act of Legislature under which the bonds in question were issued, being (as they insist) unconstitutional, and void, this defense of *ultra vires* may be made. Numerous authorities are cited to support these proposition, and it seems to be assumed by counsel that such was the decision of a majority of the court in this case. No such propositions are discussed by counsel for the defendant in error, and we do not understand that the opinion of the majority of the court, delivered by the Chief Justice, is placed upon such grounds.

For the purposes of this case the general proposition claimed by counsel may be conceded.

The brief of counsel for plaintiff in error (Mr. Phillips) is prefaced with the interrogatory: "Is a municipal corporation, when "sued by the *bona fide* holders of its negotiable bonds, estopped "from pleading that the act under which they were issued is uncon- "stitutional and void?"

This is not the question presented for determination. The question, as we understand it, would more properly be this: Can a municipal corporation, when sued by the holder of its negotiable bonds, issued under an act officially published as a law of the state, enrolled as such, authenticated by the signatures of the presiding officers of both branches of the General Assembly of the State, and of the Governor, in pursuance of the constitution of the State and further authenticated under the great seal of the State, repeatedly recognized by the Legislature and Executive Departments of the State as an existing statute, and promulgated as such for nearly twenty years, be estopped from pleading that the acts under which they were issued never passed, because the journal of the Senate *fails to show* that the ayes and noes were entered thereon upon the passage of the bill, (as required by the constitution) and thus defeat the payment of its just obligations, while retaining the consideration for which they were issued?

We submit that it cannot, and that the municipal corporation is and ought to be estopped from questioning the constitutional passage of the law under the circumstances stated in the foregoing proposition.

The propriety of the application of such an equitable estoppel is well illustrated in the opinion delivered by the Chief Justice.

If the Railroad Co. had taken the bonds of the town in payment of its subscription to the capital stock of the Co., could it retain the bonds and refuse to issue the stock on the ground that

the act of the town was *ultra vires?* Certainly not. This question has been recently answered by the Supreme Court of Illinois in the case of the C., P. & S. W. R. R. Co. vs. The Town of Marseilles. (Opinion filed at Ottawa January 31, 1877.)

If a person should give his promissory note payable to a private corporation, for a valuable consideration, when sued upon by the corporation, could he be permitted, under the plea of *nul tiel* corporation, to show that upon the passage of the act for the incorporation of the plaintiff, the ayes and noes were not entered on the journal? Most certainly not. The giving of the note for a valuable consideration estops the maker from denying the authority of the payee to accept it, unless the contract is *malum prohibitum.* The assertion of this principle by the courts is of almost daily occurrence, and so well settled as to be an established and indisputable principle of law.

The question is not precisely what was done in point of fact, but, rather, that when a party has affirmed a thing to be true, upon the faith of which the other contracting party has acted, he will not be permitted, as against the other contracting party, to assert the falsity of that which he has so affirmed to be true.

But it is said there was no law authorizing the town to subscribe to the stock of the Railroad Co. and issue its bonds, because the Supreme Court of the State has held that *whenever* it is *proved* that the journal *fails to show* the ayes and noes entered thereon, upon the passage of the bill, then the law is void: therefore it is said there was no authority for the vote under which the bonds were issued, and the unauthorized vote of the majority cannot bind the minority, hence there can be no estoppel. Again, it is further argued that there being no law authorizing a vote of the people upon the question of issuing bonds, there was no authority for their execution by the Supervisor and Town Clerk. That they were not "corporate authorities" for that purpose, and hence the town can not be estopped by their acts.

If the Supervisor and Town Clerk had assumed to bind the town of their own volition, without a vote of the people and without color of law, or presumption of legal authority, then it would be conceded that their acts, if unauthorized, would bind no one. Their assumed authority would be like that in the issue of the Floyd acceptances—a mere *ministerial* act without color or authority of law, and all persons purchasing securities so issued would be chargeable with notice of the extent of the powers of such ministerial officers, so assuming to act, and, as said by the Chief Justice, in this respect, "all parties would stand upon an equal footing and each could judge for himself" as to the power of such *ministerial* officers.

(1) The law under which the bonds in question were issued, was promulgated as a valid law, and it is conceded was *prima facie* valid. (2) Under the rulings of the Supreme Court of Illinois, that court was bound to presume it, as so promulgated, to be a valid law and take judicial notice of it as such. (3) It was *prima facie* a valid law as to the legal votes of South Ottawa, and obedience to its provisions in the conduct of elections held under it could have been enforced by mandamus upon a presentation of the proper facts, or disobedience thereto punished by the indictment and conviction of persons voting contrary to its provisions, or of those guilty of official misconduct in the performance of the requirements of the law, and whatever was done by the people of South Ottawa it must be conceded was done under an existing legal presumption of corporate power. The acts of the Supervisor and Town Clerk in the issuing of the bonds were not simply ministerial acts done of their own volition, but they were performed in their official capacity, in conformity with the provisions of a law presumptively valid and of an *election held by the people under such presumptively valid law.* That it was *prima facie* valid is conceded (see p. 1, Judge Dickey's brief), and it is further conceded by counsel that if the statute was valid

the validity of the bonds is unquestionable (see Judge Dickey's brief, foot page 3).

So, then, that the bonds in question were issued under *color* of law, so to speak—in strict confirmity to a law *prima facie* valid—being conceded; it necessarily gave to the town of South Ottawa, with reference to the execution of powers assumed to be conferred thereby, a corporate *status* as a body politic, which all persons dealing with such corporation with respect to matters connected with the exercise of such apparent corporate power, had the right to assume they might lawfully do, and that they would be protected in the enforcement of their contracts with the corporation, founded upon valuable considerations, and the equitable principle of estoppel may thereupon be invoked to repel any pretense by the town that it could set up its want of power in the matter. The very moment the town became *prima facie* invested with the right to hold an election and issue its bonds under a law of the State *prima facie* valid, all persons had the right to assume the unquestionable power of the town to do these acts, and be protected in their dealings with the town upon the faith of such law.

There can be no pretense that the journals of the Senate are constructive notice to any one of what they contain. Hence, if it was a question of fact as to whether the published law was a valid law, the right of the parties must be determined by the same principles applicable to the assertion of any other fact upon the faith of which parties are induced to contract. To deny this application of the principle of estoppel under such circumstances would be simply to violate the plainest principle of common justice.

It is said by counsel (Judge Dickey's brief, p. 8) conceding that the courts of Illinois do not take judicial notice of the Legislative journals, nor do they take judicial notice of the record of deeds. While this is true, a party is not permitted to invoke the

protection of the registry acts, against his solemn affirmation of a fact connected with the title against another, upon the faith of which declaration, the other party has been induced to rely and part with his money.

The bonds in question were issued in pursuance of a vote of the people—acting in their capacity as a body politic—and not by any ministerial agent for them, who assumed to act without their authority. The people of the town, acting in town meeting assembled, composed "the corporate authorities." They assembled in their sovereign capacity, so to speak, and without any intervening agency. *They were the corporation and body politic*, and the record of what they did, is attested by the official certificate of the Supervisor and Town Clerk, who are clothed with ample and specific powers, not only by the general laws of the State, but by the act in question, and the amendatory act, to certify what was done at this town meeting; and what was done is recited upon the bonds, viz: an election duly called and held, a vote taken to make the subscription and insu e the bonds, a majority of those voting voting affirmatively upon the proposition.

In view of these indisputable facts, the suggestion of counsel that they offered to prove upon the trial that only a minority of the legal voters of the town voted for the issue of the bonds is entitled to no consideration: (1), because this court has uniformly held that the recitals upon the face of the bonds cannot be controverted: (2), it is entirely immaterial, as a majority of the legal voters of the township was not required by law: (3), there is no such offer of proof to be found in this record: (4), the proof offered is set out on page 18 of the record, and concedes that an election was duly held, and that the election was in all respects held and conducted in the manner prescribed by the supposed act of 1857, as is conceded by counsel, (see p. 3 Judge Dickey's brief).

When it is conceded that the Legislature may constitutionally confer the power upon the people of a town to vote aid to railroad

companies and issue their bonds, and these acts are done by the people as a body politic and corporate under *color of law*, by virtue of a statute which every one in the State had the right to presume to be a valid one, the obligations so issued in the hands of innocent *bona fide* purchasers, for value, should be treated precisely as like obligations issued by any private corporation; and when the town has received and retains the consideration for which they were issued the principle of estoppel should be applied the same, in all respects, as it would if the bonds had been issued under like circumstances by a private corporation, and no rational and fair reason can be assigned why it should not be so, for the people of the town have received the consideration, and in their capacity as a body politic and corporate have sanctioned their issue. To discriminate between municipal and other corporations under such circumstances is simply to indulge in subtle refinements, wholly at varience with sound sense and common honesty.

In addition to what has been already suggested in the former brief filed on behalf of defendant in error, in connection with the authorities there cited, it is not deemed necessary to pursue this branch of the subject further.

THE RULE OF DECISION IN ILLINOIS.

It is said by his Honor, Mr. Justice Bradley, in his dissenting opinion in this case, that "to say that the Federal and State Courts differ from each other on a point of evidence seems to me to belittle the nature of the controversy, which really is a difference of construction of the constitution of Illinois."

If this is so, then the responsibility for belittling so grave a question rests upon the Supreme Court of Illinois; for, from the case of Spangler vs. Jacoby, decided in 1853, down to Miller vs. Goodwin, and Larrison vs. Railroad Co., decided in 1875, it has uniformly been held by that court that the question as to whether

an act of the Legislature, duly signed and enrolled, is in fact a law, is made dependent upon the sufficiency of the evidence of its existence in a given case.

In Spangley vs. Jacoby (14 Ills., 300) the Court say: "It certainly was not the intention of the framers of the constitution that the signatures of the Speakers and the Executive should furnish conclusive evidence of the passage of a law. The *presumption* indeed is, that an act thus verified became a law pursuant to the requirements of the constitution. But that *presumption* may be *overthrown*. If the journal is *lost or destroyed this* PRESUMPTION *will sustain the law*, for it will be intended the proper entry was made on the journal."

So it will be seen that the actual production of the journal, or an exemplified copy of it, showing the final vote by ayes and nays entered thereon, is not absolutely necessary to sustain the validity of an act published and promulgated as a law: for, if the journal be *lost or destroyed*, the validity of the law rests upon the *presumption* that the constitutional requirement was complied with, necessitating, in that event, the determination of the question of the validity of the law, by force of a *presumption*, arising from the authentication of the act as by the signatures of the presiding officers of both branches of the Generally Assembly, and of the Governor, that the constitutional requirement has been complied with. The express provision of the constitution in this regard is worthy of note. Sec. 23 of Article 3 of the Constitution provides: "every bill shall be read on three different days * ** *and every bill having passed both Houses shall be signed by the Speakers of their respective houses.*" And Sec. 51 of Article 4 provides that "*every bill which shall have passed the Senate and House of Representatives* SHALL, BEFORE IT BECOMES A LAW, *be presented to the Governor: if he approve it he* SHALL SIGN IT," &c.

What language can add to the implicit evidence manifestly in-

tended to be given of the passage of a bill in accordance with the requirements of the constitution, by the authentication thus provided for by the constitution?

It is believed that no State has the power, under the Federal Constitution, to thus provide by its organic law as to how the acts of its Legislature shall be authenticated, and then by judicial construction determine that such authentication shall merely create a *presumption* that the law was duly passed, which may be overthrown by a resort to the legislative journals, *if they omit* to *show* that *all* the forms of legislation provided for were observed upon the passage of the bill. The Supreme Court of Illinois say the journals are not public records of which the courts of Illinois will take judicial notice, (I. C. R. R. Co. vs. Wren, 43 Ills., 77; Grab vs. Cushman, 45 Ill., 124,), but, until a controversy is raised as to the passage of the law, every one is permitted to rest upon the *presumption* as to the validity. What is this then but a question of evidence? and how can it be said that it involves a question of the construction of the constitution, when there is no ambiguity about the constitutional provision upon the subject, and no controversy as to what it means? It undoubtedly requires the ayes and noes on the final passage of every bill to be entered on the journals, and, this, it is believed, was intended solely to operate as a restraint upon the members of the Legislature, by fixing the responsibility for the passage of all acts upon each and every member of the Legislature, and not as an infallible test by which the passage of the law in pursuance of the requirement of the constitution, or its authenticity was to be determined; for, if this were so, all courts would be absolutely required to take judicial notice of the legislative journals.

The moment it is conceded by the Supreme Court of Illinois, that the courts are imperatively required to take judicial notice of and administer a law officially promulgated as such, until its authenticity is questioned, but that then, upon a sufficient showing

they may make a "new departure," and determine that the presumption as to its existence as a valid law is overcome by evidence "that is clear and convincing," (as said by the court in Larrison vs. R. R. Co., 77 Ills., 18,) the whole gravity of this question as a constitutional question vanishes, and it is thence belittled into a mere question of evidence. The only rational solution of this question is to recognize the rule of evidence as to the existence of a public statute which has been acquiesced in from time immemorial, viz: that the enrolled bill duly authenticated imports *absolute verity*. For this is a question which affects not only every citizen of Illinois but every citizen of every State, and the citizen of any State should have the absolute right to rely upon the public statutes of another State duly, promulgated as such, as importing *absolute verity*, and such was the intention of the Federal Constitution when it provided that full faith and credit should be given *in each State to the public acts of every other State*, and that *Congress* should provide how such public acts *should be proved*. Const. U. S. § 1, Art. 4. But this branch of the case will be hereafter considered.

To resume the consideration of the authorities relied upon by our adversaries, as establishing the rule of decision in Illinois: Turley vs. Logan County (17 Ill. 153) was decided when the court was composed of three Judges. In the separate opinion delivered by Skinner, J., he says: "I do not deem it necessary upon this record to decide upon the effect upon the acts of the General Assembly duly authenticated by the signatures of the presiding officers of the respective Houses, and the approval of the Governor, of the absence of evidence in the journals of their regular passage, *and upon this point I reserve my opinion.*"

Prescott vs. Canal Trustees (19th Ill., 324) was submitted upon an *agreed case* as to the facts relating to the passage of the supposed bill in controversy. Breese, J., says: "Such an act is to be

found in the statute book, but in reality there is no such law in existence, and never has been."

The agreed case shows that, in fact, the supposed law never passed, and *was never enrolled as a law.* It was simply erroneously published among the public laws. But as there was no *enrolled bill* to support it, it of course had no validity.

The case of the People vs. Starne, referred to by counsel in petition for re-hearing in this case, was purely local in its character, and did not in any sense involve the rights of the holders of commercial securities which might pass by delivery and be sold in the open market, in all the commercial centers in the different States. Mr. Ch. J. Walker, in delivering the opinion of the Court, speaking of the propriety of resorting to the journals for the purpose of overthrowing the presumption as to the validity of the published law, while adhering to the rule laid down in Spangler vs. Jacoby, says, (35 Ill., 136): "We are not, however, prepared to say that a *different rule* might not have subserved the public interests equally well, leaving the legislature and the executive to guard the public interests in this regard, or to become responsible for its neglect." And, in conclusion (p. 142), it is further said: "Whatever may have been our inclination, had the question been presented for the first time by this case, the weight of authority and the prior decisions of this Court must control."

In Grob vs. Cushman (45 Ill., 124) it was sought to establish, by specific reference to the printed journals of the General Assembly, that an act conferring additional jurisdiction upon the County Court of La Salle County was not constitutionally passed in this, that the bill, after being introduced in the lower house, was read a first and second time under a suspension of the rules, referred to the judiciary committee (House journal Ill., 1865, p. 710) and the committee recommended its rejection (Ibid. 815). The report of the committee was concurred in, and, on further motion, the enacting clause was

stricken out, but the bill passed in what was formerly known in the history of Illinois legislation as an "omnibus," embracing several hundred bills, more or less, and thus establish, under the previous decisions of that court, that the bill, being without an enacting clause, was passed contrary to Sec. 20 of Art. 3 of the Constitution of Illinois of 1848, and therefore void.

The counsel for the defendant in error in this case, who argued the case above cited for the plaintiff in error in that case, failed to induce the Supreme Court of Illinois to depart from the rule laid down in Ill. Cen. R. R. Co. vs. Wren, although the question raised involved the jurisdiction of a court of record, and of necessity the jurisdiction of the Supreme Court, upon appeal, to give effect to the judgments and decrees — the County Court as originally established having no chancery jurisdiction, being limited to cases wherein amount involved did not exceed $1,000 (Laws Ill. 1854, p. 239), whereas by the amended act, which it was claimed was not constitutionally passed, the Legislature assumed to confer upon the La Salle County Court concurrent jurisdiction with the Circuit Court within the county, except in criminal matters. (Laws of Ill., 1865, pp. 37-8.)

The Supreme Court of Illinois declined to "explore the journal," although it was urged that the court was bound to know what the law was, and especially upon the vital question of jurisdiction, and, per Walker, J., said (p. 124). "*It is true the journals are public records, but it does not follow that they will be regarded as within the knowledge of the courts, like public laws, but, like all other records and public documents, they should be brought before the court as evidence.* * * * UNTIL SO PRODUCED THEY CANNOT BE REGARDED BY THE COURTS. THIS IS THE RULE—*announced in the case of the I. C. R. R. Co. vs. Wren, 45 Ill's, 77.*"

From the passage of the act of 1865 until the adoption of the constitution of Illinois of 1870 this La Salle County Court exer-

cised within its territorial limits, all the functions and powers of a court of general jurisdiction in civil suits, in law and equity, upon the *presumption* as to its right so to do, arising from the authorized promulgation of the act of 1865 as a valid law. Whereas, upon the introduction of the same character of proof that was proposed to be introduced in the court below, the act conferring additional jurisdiction upon the La Salle County Court would be held by the Supreme Court of Illinois to be unconstitutional and void and its judgments and decrees, when the amounts involved exceeded $1000, absolute nullities.

It is here remarked with reference to the question of *estoppel*, before considered, that the Supreme Court of Illinois, in *Grob vs. Cushman, supra*, applied this very doctrine of *estoppel* as to questioning the existence of an alleged unconstitutional law, which was applied upon the trial of the case at bar, with this difference: in the latter case it was applied for the reason that it was contrary to a sound elementary rule of law, and because it would permit the defendant to gainsay that which it had solemnly affirmed to be true, and upon the *faith* of which the securities in question were purchased; whereas, in the Grob-Cushman case, it was applied upon the mere *technical* ground that the *fact* that the law was unconstitunally passed, and therefore void, was not sufficiently pleaded and proved. So, while the Supreme Court of Illinois apply the doctrine of *estoppel* as to the existence of a supposed public statute, upon mere *technical* grounds, and from a traditional aversion to "exploring the journals" of the Legislature, and do not thus hesitate to permit a person to be deprived of his personal liberty or divested of his property, under a law alleged to have been unconstitutionally passed, yet this application of the doctrine of estoppel is commended by our adversaries, while at the same time they complain bitterly when it is applied by this court in behalf of the *bona fide* holders of commercial securities, and against the unconscionable attempts of their clients to defeat the collection of these

securities purchased upon the solemn affirmation of the town that they were valid and for which it received a valid consideration, and still retains it.

The People vs. DeWolfe, 62 Ill's. 253, was a proceeding by mandamus to compel DeWolfe to assume jurisdiction as a justice of the peace, under the act of the Legislature extending the jurisdiction of justices, to matters where the amount did not exceed two hundred dollars, whereas, their jurisdiction had previously been limited to cases where the amount involved did not exceed one hundred dollars, and the question was whether this act extending the jurisdiction of justices was a valid law.

It appeared from a return to the writ, that an amendment to the bill was adopted by the Senate, but that the House refused to concur in the amendment. The court, upon the facts alleged in this return, which were not traversed, held the bill to be invalid, and said (p. 259): "Our decision is predicated SOLELY *upon the state of facts* set forth in the return in the case, *without an inspection of the journal of the Senate; and we pass upon the* VALIDITY *of the act in question no further than as affects the* PRESENT APPLICATION *in view of the* ADMITTED FACTS IN THE CASE."

From the foregoing language of the court no other conclusion can be drawn than this: that upon "another state of facts," admitted by the record or proved to exist, this same court might hold that the law in question was a valid law, and compel obedience to it as such, and would not be precluded by its prior adjudication with respect to the validity of the law in question. And in harmony with this view is the case of The Ills. Cent. R. R. Co. vs. Wren, (43 Ill., 77) cited on p. 16 of the brief filed upon the first argument of this case, and commented upon by his Honor, the Chief Justice of this Court, in the opinion delivered, in which case the court further say: "If counsel say the journal shows a law to have been passed without calling the yeas and nays, let them make

the requisite PROOF of that fact * * *. In the present case we have been referred to the printed journal. We are not aware of any law that makes it evidence of the contents of the original, but if it were it is not sufficient to refer us to it. A duly authenticated copy of so much of the original journal as shows the *facts relied upon by counsel* for impeaching a law *prima facie* valid *must be brought before us through the record.* In Spangler vs. Jacoby the journals were made a part of the bill of exceptions, and in every case that has hitherto come before this court in which questions of this character have been raised *the facts have been presented by the record.*"

In Ryan vs. Lynch (68 Ills., 160) the opinion contains a long recital of what was proved upon the hearing, and the opinion of the court is based upon the supposed effect of the *proof* offered to invalidate the law.

The opinion in Miller vs. Goodwin rests upon the same ground, and the sufficiency of the proof in the record to impeach the law is elaborately discussed. The court say: "It is *presumed* that a record made pursuant to law is accurate until the contrary is successfully established * * * * We are of opinion the transcript in evidence was of the proper record, and that it is conclusive against the validity of the pretended act * * * * In no other respect than the one just noticed does this present case materially differ from that of Ryan vs. Lynch et al."

It will be observed that in the introductory part of the opinion in Miller vs. Goodwin, before proceeding to examine the *evidence* in that case, the court say: "The evidence upon which we came to that conclusion (referring to Ryan vs. Lynch) was a transcript of the Senate journal, certified by the Secretary of State in proper form. The same evidence is before us in the present case, but there is also evidence introduced by appellants for the purpose of *impeach-*

ing this transcript now before us, and our first enquiry must be as to the effect of that evidence."

Again, in Larrison vs. P. A. & D. R. R. Co., decided at January Term, 1875, Mr. C. J. Walker, in delivering the opinion of the court, says (77 Ills. p. 18): "If we find a law signed by the Speakers of both Houses, and approved by the Governor, we must *presume* that it has passed in conformity to all the requirements of the constitution, and is valid, until the *presumption* is overcome by *legitimate proof*. And in such a case the *evidence* must be clear and convincing. It is by no means sufficient to only create a doubt whether the requirements of the organic law have been observed, but it must be *clearly proved*.

"In this case we do not think that the proof offered to impeach this law has produced that effect, but it has failed to even cast a doubt on the proceedings by which it was adopted."

It will be seen from the foregoing decisions of the Supreme Court of Illinois that the existence or non-existence of the supposed statute is, beyond doubt, made dependent upon the proof in each particular case and upon the question as to whether the existence of the alleged law is controverted, by the opinions of the court in People vs. De Wolfe, I. C. R. R. Co. vs. Wren, and Grob vs. Cushman.

The whole difficulty in which this question is involved results from a departure by the Supreme Court of Illinois from the rational settled principle of elementary law with reference to the establishment of the existence of public statutes, as laid down by the text writers, ever recognized by the courts of Great Britain, and concurred in by most of the higher judicial tribunals in this country. And in support of the decisions rendered by the Supreme Court of Illinois, and to the extent that court has gone, we have been unable to find a well considered case. It is assumed by counsel for plaintiff in error (Mr. Phillips), and the same view seems to be concurred

in by Mr. Justice Bradley, that the decisions in Ryan vs. Lynch and Miller vs. Goodwin positively determine, not only as to the parties between those suits, but as to all persons whomsoever, that the act of 1857, under which the bonds in question were assumed to be issued, "is not a law of the State *to-day*," whereas under the rules of evidence applied by the Supreme Court of Illinois, while it has been determined in those two cases that this statute is no law, yet *that court*, and every other judicial tribunal in the State *to-day*, would have to treat the act of 1857 as *prima facie* a law upon the production of the statute; and unless, upon the proper issue made and proof introduced impeaching the validity of the law, such courts would be required to take judicial notice of it as a valid law in force *to-day* in all controversies with respect to alleged rights growing out of it. And under the rule of evidence which the Supreme Court of Illinois has seen fit to apply to determine the existence of a public statute, *when its existence is controverted*, if a suit were brought in the State court of Illinois *to-day* upon one of the bonds issued under this supposed law, and no issue were raised as to the existence of the law, and no other defense shown, the Court would be required to render judgment for the plaintiff; and if the case were appealed to the Supreme Court of the State, that Court would refuse to "explore the records," or look at the transcript of the Senate journal at the suggestion of counsel, in order to determine whether the act was constitutionally passed, and the judgment would *unquestionably* have to be affirmed, notwithstanding the decisions of the Supreme Court of Illinois in Ryan vs. Lynch and Miller vs. Goodwin. So we would have the spectacle presented of the Supreme Court adjudicating in one case that an alleged statute was a valid law, and in another case that it was no law. In fact such a state of things exists to a certain extent *to-day*, for, in point of fact, the records of the courts of Illinois will show that in cases involving the rights and liabilities of the parties growing out of this

law in controversy the courts have recognized its existence as a valid law and determined the rights and liabilities of parties without questioning, but, by necessary implication, of course, affirming the validity of the law. So the Supreme Court of Illinois might, in an action involving rights and liabilities of parties under the act declared invalid in The People vs. DeWolfe *supra*, hold the very *identical law* so declared *invalid* to be a *valid* law in full force and compel obedience to their judgment.

It is believed that the practical difficulties resulting from the application of the rule laid down in *Spangler vs. Jacoby* occurred to Mr. C. J. Walker in delivering the opinion of the court in *The People vs. Barnes* (35 Ill's 142) when he said: "We are not, however, prepared to say that a different rule might not have subserved the public interest equally well." It is believed that the intimation of the learned Judge in the case last cited indicated very clearly that, if the question was then presented to the court for the first time, the extraordinary rule laid down in *Spangler vs. Jacoby* would never have been enunciated by that court.

It is assumed by counsel for plaintiff in error that the first and only recognition of the law of 1857 was by the assumed issue of bonds under it in aid of the Ottawa, Oswego, and Fox River Valley Rail Road Company, but, it will be observed, that the act provides for the like issue of bonds in aid of several other corporations, and the records of the courts of Illinois show a very considerable number of cases arising upon bonds issued in aid of these several railroad companies, other than the O., O. & F. R. V. R. R. Co.

If this court should deem itself bound by the decisions of the Supreme Court of Illinois, as construed and relied upon by our adversaries, it would of course have to adopt those decisions to their full extent, and if a case should come to this court for review, wherein judgment had been rendered upon some other of the series of bonds in controversy, but in which the existence of the law *had*

not been controverted, but the reversal of the judgment was sought upon other grounds, in following the decisions of the Supreme Court of Illinois, it would, unless there were other reasons for its reversal, have to affirm the judgment, thus judicially recognizing the validity of the law, whereas the case at bar, arising under the same supposed law, would have to be reversed. So notwithstanding the decision of the Supreme Court of Illinois in the case of *The People, on the relation of Rentz, vs. DeWolfe* held that the law of 1871, extending the jurisdiction of justices of the peace, was not constitutionally passed, yet if the explorations of the crypts of the office of the Secretary of State, by some other litigant whose asserted rights under that supposed law had been denied by DeWolfe, (acting in his judicial capacity), led to the conclusion that that law did constitutionally pass, and he should be able to satisfy the court by "the legitimate proof" that such was the fact, he might subject DeWolfe to heavy damages for the refusing to take cognizance of his rights under a public statute of the State although the existence of the statute was upon one occasion so obscured that the Supreme Court of the State could not discover it with its judicial eye. So also some person who had been deprived of his liberty or divested of his property by means of some process issued by the La Salle County Court, under its assumed extended jurisdiction, might mulct the officer executing the writ, or party at whose instance it was issued, in heavy damages if he could make the "legitimate proof" that the law extending the jurisdiction of the court was not constitutionally passed, and in either case the defendant would appeal in vain to the courts of Illinois for protection, because in *Grob vs. Cushman* and in *The People, &c., vs. DeWolfe* the Supreme Court of the State had assumed that the supposed law in question was a valid one, and had *estopped* the parties who sought to question the existence of the statute in the first case from questioning it, and held the supposed statute void in the latter case.

He would be met by the language of the court in the latter case, viz: "We pass upon the *validity* of the act in question *no* further "*than as affects the present application in view of the admitted facts* "*in the case.*"

In Spangler vs Jacoby the writ was quashed, because the agreed case showed that the law changing the term for holding the court was not constitutionally passed, but, if Jones or Smith had sued Spangler instead of Jacoby, and no agreed case had been made, and no proof offered as to the manner in which the bill fixing the time of holding the court was passed, Spangler would have been *estopped* from questioning the validity of the law, his motion to quash the writ overruled and the jurisdiction of the court over him maintained, and, if he had further prosecuted the case by appeal to the Supreme Court of the State, that judgment in the case against Spangler would have been affirmed, for it was *only* decided in the case of Spangler vs. Jacoby that the law for holding the court at the time at which the writ was returnable was void "in view of the admitted facts in that case." And so the court might, upon the doctrine announced in Ills. Cent. R. R. Co. vs. Wren, Grob vs. Cushman and People vs. De Wolf, assume jurisdiction in one case and refuse to entertain jurisdiction in another, governing itself by the sufficiency of the proof as to the validity of the law, when any was offered, and applying the doctrine of *estoppel* against questioning the validity of the law when *no* proof was offered as to the manner in which it passed the Legislature. And this is the doctrine that this court is asked to adopt as *the rule of decision*, "however absurd it may appear to this court to be," and disregard its own right of every appellate court—to pass for itself upon all general questions of evidence.

THE RULE OF DECISION IN THE FEDERAL COURTS

The necessity for some unvarying rule whereby the existence of a public statute of a State might be determined was felt and appreciated by the framers of the Federal Constitution, and to establish a uniform rule in this regard it was provided by Sec. 1, of Article 4, of the Constitution of the United States that "full faith and credit shall be given in each State to the public acts, records, and judicial proceedings of every other State. And the Congress may by general laws prescribe the manner in which such acts, records and proceedings *shall be proved*, and the effect thereof." In pursuance of this provision it was enacted by Congress as follows: "*The acts of the Legislature of any State* or territory, or of any country subject to the jurisdiction of the United States, *shall be authenticated* by *having the seal of such State, territory or country affixed thereto.* The *records and judicial proceedings of the* COURTS *of any State* * * * * by the attestation of the clerk and the seal of the court annexed. And the said *records* and *judicial proceedings* so authenticated shall have *such faith and credit given to them* in every court within the United States as they have by law or usage *in the courts of the States from which they are taken.*" (U. S. Rev. Stat., Sec. 905.)

The intention of the framers of the Federal Constitution in providing that full faith and credit should be given to the public acts of the several States, and expressly conferring upon Congress the power to provide how their existence should be proved, was manifestly intended to avoid all complications and embarrassments resulting from local legislation, and the adjudications of the State Courts with reference to a matter which affected not only the rights of the citizens of the several States in their commercial relations with each other, arising under the acts of the several Legislatures, but the relations between several States and the Federal Government. Hence *the existence of a public statute of a State* is one peculiarly

within the exclusive province of *this court* to determine, when the controversy is between citizens of two different States.

The declaration in this case is in DEBT. It is alleged that the bonds were made payable in the City of New York. It is alleged in the declaration (record, p. 3.) that the plaintiff was a citizen of Massachusetts; that the bonds were transferred to him at the City of New York, in the State of New York. These allegations are not controverted. The plaintiff then had a right to assume that when the Federal Constitution provided "that full faith and credit should be given to the acts of the several States," and conferred upon Congress the power to determine *how* the existence of those acts should *be proved*, and Congress had enacted that the existence of such statutes should be proved by *their authentication under the great seal of the State*. that this act imported *absolute verity* and that under it, he could deal with corporations and parties residing in Illinois and consummate his commercial transactions with them in the purchase of such securities with absolute safety, relying upon the solemn affirmation of the constitution that full faith and credit should be given to such public statute, *so authenticated in pursuance of the act of Congress.*

To illustrate the impropriety of any departure from this rule: Suppose it was desired by the Federal Government to purchase and acquire jurisdiction over a tract of land in the State of Illinois, the title of which was in the State; that, overtures to this end being made, the General Assembly should attempt to make provisions by the passage of an act to grant the land and cede jurisdiction over it to the Federal Government, and provide for the appointment of commissioners on behalf of the State to arrange with reference to compensation, and consummate the transfer. In their negotiations with the Federal Government they produce, as the evidence of their authority to act, the proper evidence of their appointment and what purported to be a copy of the act of the General Assembly author-

izing those things to be done, duly authenticated under the *great seal of the State*, in compliance with the act of Congress. This authority being recognized, the land is conveyed to the Federal Government and jurisdiction over it ceded and consideration paid, would this Court permit the State of Illinois thereatter to say that this act, thus authenticated, was merely *prima facie* evidence that it had been constitutionally passed, and that the presumption of its existence might be rebutted by proving (if it was thereafter discovered that such was the fact) that an inspection of the Senate journal *failed to show* that a vote was taken upon the passage of the bill by ayes and noes, and who voted for it and who against it, and thus defeat the effect of the act so solemnly authenthicated, reclaim the land so granted and release its jurisdictiction over the same?

It is confidently believed that this court would, upon the supposed case, have to hold that the act of the General Assembly so authenticated imported *absolute verity*.

A copy of the enrolled bill, duly authenticated as required by the act of Congress, was produced upon the trial of the case at bar (Record, p. 16): Many examples might be cited illustrating the impropriety of any departure from the general principle which, it is contended, should control in determining the existence of this law.

The Federal courts have had occasion to construe this act of Congress, above referred to, and, in this connection, we ask the attention of the court to the case of the *United States vs. Johns*, 1 Wash. C. C., R. 363). An act of the State of Maryland incorporating the Baltimore Insurance Company was offered in evidence, certified by the clerk of the executive council, and the seal of the State was annexed. The introduction of this act was objected to because it did not appear that it was authenticated by the proper officer, and that he had a right to affix the seal of the State thereto, but the Court said : "The act of Congress, as to all public acts of judicial bodies and others, directs as to who is to authenticate them;

but as to the latter *it merely requires the seal of the State to be annexed.* This law being so authenticated is proper evidence within the true construction of the act of Congress."

In the case of the *United States vs. Anedy* (11 Wheat, 392) the prisoner was indicted under the act of Congress for destroying a vessel with the intent to defraud the underwriters and found guilty. It appears that, upon the trial, the government offered in evidence what purported to be exemplifications of the acts of the Legislature of the State of Massachusetts incorporating the Boston Insurance Company. The papers offered in evidence were printed copies of the acts, but there appeared to be varions erasures and interlineations in writing. Each act had appended thereto a separate attestation, viz: "A true copy, attest—Edward D. Bangs, Secretary." The copies were attached together and exemplified under the *great seal of the State of Massachusetts* and the Secretary of the Commonwealth. Mr. Justice Story, in delivering the opinion of the court, while depreciating the loose and irregular manner in which the exemplification of the acts was made, said (p. 506–7): "It is under the seal of the State and verified by the signature of its Secretary. It is said that this is not enough, and that it ought to be shown that the Secretary had authority to do such acts. This objection must be decided by an examination of the act of Congress of the 26th May, 1790, prescribing the mode in which the public acts, etc., of each State shall be authenticated * * * That act provides that the acts of the Legislatures of the several States shall be authenticated by having the seal of their respective States affixed thereto. *No other or further formality is required, and the seal itself is supposed to impart absolute verity.* The annexation must, in the absence of all contrary evidence, always be presumed to be by a person having the custody thereof and competent authority to do the act. We know, in point of fact, that the Constitution of Massachusetts has declared 'That the records of the Common-

wealth shall be kept in the office of the Secretary.' *But our opinion proceeds upon the ground that the act of Congress requires no other authentication than the seal of the State.*" And, after overruling the objection to the documents because of the erasures and interlineations therein, it was held that the papers were properly admitted in evidence.

Judge Story, in his treatise upon the constitution, § 1311, says: "It is obvious that this clause (referring to the provisions as to the effect to be given to the public records and judicial proceedings of the States) "is wholly beside the preceding (meaning the clause providing how the public laws of the State shall be *proved*) whatever may be the faith and credit due to the public acts, etc., of other States * * * The mode of establishing them in proof is of very great importance, and upon which a diversity of rules exists in different countries. The object of the present constitution is to introduce *uniformity* in the rules of proof, which could alone be done by Congress. It is certainly a great improvement upon the parallel article of the Confederation that left it wholly to the States themselves to require any proof of public acts * * * which they might from time to time deem advisable, and when no rule was prescribed the subject was open to the decision of the judicial tribunals according to their own views of the local usage and jurisprudence. Many embarrassments must necessarily have grown out of such a state of things. The provision, therefore, comes recommended by every consideration of wisdom and convenience, of public peace and private security."

This court, in *Olcott vs. Supervisors*, said. "It is undoubtedly true in general that this court does follow the decisions of the highest courts of the State respecting local questions peculiar to themselves, or respecting the construction of their own constitutions and laws. But it must be kept in mind it is only decisions upon local questions, those which are peculiar to the several States, or adjudi-

cations upon the meaning of the constitution or statutes of a State, which the Federal Courts adopt as rules for their own judgments." (16 Wall, 689.)

In the case of the Town of Pine Grove vs. Talcott (16 Wall, 666) as we have before remarked, this Court decided, with respect to commercial securities and the power of the municipalities to issue them, that the question belonged to "the domain of general jurisprudence, in which class of cases this Court is not bound by the judgments of the courts of the States where the cases arise—but that "it must bear and determine for itself," when commercial securities of the character of those in question were involved. With how much greater force does this rule present itself when the validity of such securities depend upon the existence of a public statute authenticated in pursuance of the act of Congress enacted under an express provision of the Federal Constitution.

Why did this Court hold in the Pine Grove case that it would not be bound by the decision of the Supreme Court of Michigan, that, under the constitution of that State, municipal corporations had no right to issue bonds in aid of railroads? We can conceive of no ground upon which that decision can rest, except that upon which it seems manifest that it was placed, viz: that it involved a question as to the power of corporations to execute commercial obligations, which were the subject of sale and transfer in all monied centers of the country. For it is undeniably true that the commercial value of such obligations depend almost wholly upon their negotiability, and they are, therefore, in most cases made payable in New York, the great monied center of this country, and from which they are distributed throughout the country. And were it not for the reliance placed upon the authenticated and published laws of the States public confidence in such securities would be at once destroyed. Such a result, it must be conceded, would be deplorable, indeed, and such an one, it is confidently believed, this court will not permit to occur with its sanction and approval.

The general importance of the question involved, and the extent of the pecuniary interest directly affected by its determination *by this Court*, far outweigh any considerations connected with the maintenance of those relations of comity, so desirable to be pursued between this court, as the highest judicial tribunal in the land, and the Supreme Court of Illinois, the importance of which is duly considered and conceded. But such collisions, however undeniable, are, nevertheless, unavoidable. Yet, as we have before urged, and as is correctly stated by Mr. Ch. J. Waite, in his opinion in this case, the Supreme Court of Illinois has never yet held that the principle of estoppel applied on the trial in this case, and approved by a majority of this Court, (with a desire, it is beleived, to avoid a seeming conflict with the State courts of Illinois upon the subject of the existence of a public statute) would not be applied by that court upon the same facts disclosed by this record. On the contrary, from the authorities cited in the former brief filed in this case, and some of which are considered in the opinion delivered by the Chief Justice, we confidently believe that when the Supreme Court of Illinois passes upon this question, in a case involving the private rights of the *bona fide* holders of negotiable securities, purchased upon the *faith* of the law in question, its decisions will "not be in conflict" with the decisions of this Court.

But our adversaries insist upon forcing this question upon the attention of this court, and, in this connection, we trust we may be pardoned for presenting the views of the Supreme Court of Illinois with reference to the maintenance of comity between that court and this, as expressed in *Braxon vs. Bressler*, 64 Ill., 488.

In that case the defendant was sued for taking stone from the bed of Rock river, Illinois, a navigable stream, the plaintiff claiming to own to the centre of the stream as a riparian proprietor. It was conceded that the stream was navigable in fact. The defendant, upon the authority of the decision of this court in *R. R. Co. vs. Schurmier*, 7 Wall, 272, construing the act of Con-

gress of May 17, 1796, with reference to the rights of riparian proprietors upon such streams holding under grants from the U. S. Government, claimed that the plaintiff did not own the bed of the stream, and could not maintain an action for the stone taken therefrom; but the Supreme Court of Illinois refused to be bound by the decision of this Court in that case, although the question involved the construction of an act of Congress, the rights of the parties under a grant from the Federal Government, and from which decision of the Supreme Court of Illinois the right of appeal existed to this court.

The enquiry, as made by Mr. J. Bradley, may here be repeated: What are the people of Illinois to do? Are they to obey the statute as a law, or are they not?

It is believed that, in the case above cited, obedience is required and will be yielded by the people of Illinois to the act of Congress, and the construction put upon it by the highest judicial tribunal authorized to construe it; and that the same obedience may be claimed for, and will be yielded to, the decision of this Court in this case, if in the exercise of what seems to be not only one of the general powers of this Court, and of every Appellate Court, to pass upon, viz: a question of the existence of a public statute, but especially in pursuance of the Constitution and act of Congress, if it shall be held by this Court, as we believe it finally will be, that the public statutes of Illinois and of every other State, authenticated under the great seal of the State, import absolute verity. Of this, however, we feel assured, that every honest citizen of Illinois, who believes it is right that just debts should be paid, who abhors repudiation and who has a just regard for his good name and fame, and that of the community in which he lives, will ever feel grateful to this Court, if it shall so decide, for saving them from the base and offensive stigma, which must forever rest upon members of a political community, which is permitted to repudiate its just obligations and defraud its creditors.

G. S. ELDREDGE,
Counsel for Def't, in Error.

4-260

IN THE

Supreme Court of the United States,

October Term, 1876.

TOWN OF SOUTH OTTAWA,
—*vs.*—
N. C. PERKINS. } No. 58.

AND

THE BOARD OF SUPERVISORS OF KENDALL COUNTY,
—*vs.*—
POST. } No. 59.

Additional Suggestions

—BY—

T. Lyle Dickey,

for Plaintiff in Error,

ON APPLICATION FOR RE-HEARING.

CHICAGO:
BEACH, BARNARD & CO., LEGAL PRINTERS, 98 RANDOLPH STREET.
1876.

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Additional Suggestions for Plaintiffs in Error on Application for Rehearing.

If the Court please, I will add a few suggestions to what has been said by my associate, Mr. Phillips.

The *only* questions to be determined in each of these cases, are: Did the municipal corporation *execute the bonds* in question? Has the municipal corporation done any act as such, or by its lawfully authorized agents, by which it is estopped to deny the alleged execution of the bonds by it?

We insist that the corporation did *not* execute the bonds. We concede that certain officers of the corporation did make the bonds, in the name of the corporation, but rely

upon the fact that the officers had no valid power to do, in behalf of the corporation, what they did do in this regard. There is no question in the case in this regard, except the *power* of those pretending to act for the corporation. Now, some of the arguments presented in the opinion delivered by His Honor the Chief Justice, seem to ignore this question, and it seems to be assumed that the corporation *has done acts* in relation to this matter. This is the very question in debate. Until the *power* is established, it is not to be assumed that any act of any person or persons in behalf of the corporation, relating to the execution or relating to the supposed estoppel, is *the act of the corporation*. Once establish the *power*, and there is no necessity for repeating the acts done, for we have conceded ever that the acts are sufficient, if they were the acts of the corporation. In illustration of this remark, it will be seen that in the opinion it is said: "Can "a municipal corporation that *has issued its bonds* and put "them on the market as commercial paper, upon the faith "of this law, be permitted to show as against a *bona fide* "holder of the bonds, that the law had never, in fact, "passed?" We answer, certainly not; but where the officers of a municipal corporation, having no such power, have, without any lawful authority, issued and put upon the market bonds purporting to be the bonds of the corporation, and where, as in this case, the corporation *has not issued its bonds*, we insist the corporation may show by any legitimate proof as against the holders of bonds made by its pretended agents, that there never was any statute in force giving the necessary power. This doctrine, as shown by Mr. Phillips, has been declared by this Court again and again. The want of aptness in the question consists of the fact that the *corporation did not issue its bonds*. The bonds made by unauthorized officers are not the bonds of the corporation, and the corporation has done no act by which it can lawfully be estopped.

The Court seems to have misapprehended the contents of the record. It is said of this supposed statute, that it was "acquiesced in by the people of the State as a valid "law for more than thirteen years after its publication." This is a mistake. It lay as a dead letter upon the statute book for more than nine years before any one attempted any action under it, and the State had nothing to do with it. And again, it is said, it was "accepted and acted upon by "*the inhabitants* of South Ottawa in October, 1866, when "*they* voted under it for a subscription to the stock of the "railroad company, and *authorized* the issue of the bonds "of the township in payment." How can it be said that "the inhabitants of the town" authorized the issue of these bonds in the face of the proof offered, that those voting for the issue were a mere minority of the actual voters of the town, and in the face of the confession in the record (of the allegation in the plea) that the statute was, in fact, never passed at all by the State Senate? In debating the validity of the power, it surely is not allowable to bring to the argument a supposed fact, when the existence of the supposed fact depends upon the solution of the very question in debate. We insist "the officers had no power." Our adversaries say, "the inhabitants gave them the power." We answer, "a majority of the inhabitants did not "do so, and there was no statute enabling a minority to "give the power." They answer, "there was a statute "giving the authority printed in the statute books." We say, "it was not passed by the Senate." The Court says the passage of the statute cannot be questioned, because "the inhabitants authorized the issue." This depends upon whether this minority had power, by the statute, to do so. If they had not, their act was not the act of the corporation, or of its inhabitants, and gave no power. If the statute was valid, we do not question the validity of the bonds. To assume in an argument as to the validity

of the statute, that "the inhabitants authorized the issue," is what is called in logic, "begging the question."

Again it is said, "both parties, *acting* upon this *prima facie* "case, and supposing it to be true, have become bound." If the statute was never passed, "both parties" did not act. The municipal corporation acted, if at all, by its agents. If there was no statute, there was no power in the supposed agents, and though the pretended agents acted, the corporation did not act, because the supposed agent was not an agent. Again it is said, "one has borrowed, the "other lent. The lender has performed his part of the "contract and delivered the money. The question now is, "whether the borrower can refuse to pay as he agreed, "because, since he took the money, he has discovered he "ought not to have borrowed." This is presented as the statement of the case to be decided. This is a case very different in its features from the one shown by the record. The corporation did not borrow. First, because no statute authorized the pretended agent to make a contract to borrow. Second, because no pretended agent of the corporation ever pretended to make a contract to borrow. Third, because no money, or other valuable thing, was ever received by the corporation or by its agents. On the face of this record it is confessed that no stock even was ever received, and it is also confessed, that the stock voted for by a minority of the corporators was of no value. Lastly, if pretended agents had borrowed money for the corporation, and the money had been received and used by the corporation, without authority of law to receive it, the law would not require the corporation to repay, "*as agreed*," because the supposed agreement in such case was absolutely void. True, the corporation would be liable and compellable to repay the money; for money had and received, as in a case where there was no contract, but could not be held upon the supposed agreement.

Again — when this Court speaks of "the elementary

"principles of common honesty"—which are supposed to bear against the plaintiffs in error — and when this Court suggests that, to allow us to show that this supposed statute is not a statute — "would be to ignore a principle of com- "mercial honor upon which" a long series of decisions of this Court have been predicated, it seems clear that certain parts of these records have been overlooked.

The record shows that the municipal corporation has never received anything of value; that a majority of the voters of the town never sanctioned the issue of these bonds; that the minority, who did sanction it, had no lawful authority to speak for the municipal corporation; and that even they were induced to do so by falsehood and fraud; that the municipal corporation has done no act tending to mislead the bondholder, and has not omitted to do any act which it ought to have done for the protection of the bondholder. By what "elementary principles of common "honesty," or what "principle of commercial honor" are these unoffending and simple tax-payers bound to pay these bonds? The "long series of decisions," referred to, rest upon the principle that, by law, certain officers of the municipal corporation were authorized to determine, and decide for the corporation whether the conditions had transpired upon which the power was to be exercised, and hence the corporation is held bound by the decision so made. Having by its officers (acting within the scope of their authority) decided that the conditions had transpired, the municipal corporation is held to be estopped, as against an innocent purchaser, from showing that such conditions had not transpired. The elementary principles of common honesty, and the principle of commercial honor, forbade that a municipal corporation, which (by its officers acting with full authority) had decided that the conditions required had transpired, should be allowed to prove the contrary, after having thus, by its own act, misled the holder of the bond. Upon this principle, the doc-

trine of estoppel has been introduced into the cases embraced in this long line of decisions. The question debated, in each case, has been whether, by a proper construction of the law granting the power, these officers were made by law the judges for the corporation, to decide whether the conditions had transpired. It will not be contended, in this case, that any law ever existed authorizing the officers of the municipal corporation to decide for the corporation whether this statute had actually passed, or not; and I repeat, there has been no act done by these plaintiffs in error, either by the municipal corporation as such, or by its authorized agents, calculated to mislead the holders of these bonds. Where two innocent parties contend, the defendant must prevail.

It is suggested in the opinion (by way of interrogatory) that "if it was no part of the duty of the Supreme Court "of Illinois to explore the journals for the purpose of as- "certaining the manner in which a law duly certified went "through the Legislature, before deciding a *prima facie* "law to be a law in fact," that it must follow that it was not the duty of the plaintiff below to make such search before purchasing in the open market commercial paper issued and put in circulation on the faith of such a law. It is said, "Is the purchaser of such paper bound to know "more of the public law which governs his transactions "than the Court that must pass upon his rights when dis- "putes are to be settled?" This comment is made upon the ruling of the Supreme Court of Illinois, in the case of *The Ill. Cent. R. R. Co.* v. *Wren*, 43 Ill., 77. That case was tried in the Supreme Court, upon the transcript of a record of a proceeding in the Circuit Court. The question presented was, shall the judgment of the Circuit Court be reversed, for matters appearing on the face of its record? On examining the record, it was found that the point calling in question the validity of the supposed statute, was *not made* in the Circuit Court, but was made for

the first time in the Supreme Court. The Court simply holds that it will not consider the question, because it was not submitted to the Circuit Court, and the matter did not appear in the record of the proceedings in the Circuit Court. The Court says: "If counsel say, 'the Journal "shows a law to have been passed without calling the "yeas and nays, let them make the requisite proof of that "fact (in the Circuit Court) by means of the legislative "journals, and introduce that proof *into the record*" (of the Circuit Court). The Court lays down the rule that to raise this question in the Supreme Court, "a duly authen- "ticated copy of so much of the Journal as shows the "facts * * * must be brought before us through the "record" of the Circuit Court; and they say that otherwise they will not look beyond the *prima facie* evidence found in the printed statute books. This is a mere rule of practice in the Supreme Court of Illinois. In this case, we have complied with that rule of practice, and have shown all this *in the record* of the court of original jurisdiction, who tried the cause. We have not asked the Court to take judicial notice that this supposed statute was not passed, but we have complied with the rule, and embodied the necessary part of the Journal in the record of the Circuit Court, and thus laid it before this Court.

We cannot think that this Court will adhere to the rule, (which is, by necessary implication, laid down in the opinion of the Court delivered in this case) that the purchaser of what purports to be commercial paper, is not bound to enquire into any matter relating thereto, unless the matter be such that courts will take judicial notice thereof. The purchaser of what purports to be commercial paper may be barred by a statute of limitations, yet the courts take no note of such statutes, unless pleaded. The statute of frauds will not be taken notice of unless pleaded, and yet every purchaser is governed thereby. In some of the States usury renders a promissory note void, and in such case,

the purchaser of what purports to be valid commercial paper must buy it, if at all, at his peril, yet the courts will not take notice of the statute of usury unless the same be pleaded. The purchaser of real estate is affected by matters spread upon the record of deeds in the recording offices, and is chargeable with notice of the same; yet no court will take judicial notice that a conveyance is thus recorded. It may be said that some of these illustrations relate to matters of fact, and not of law. Be it so. This Court says, in this opinion: "Here the question is one of "fact; was the law passed, or was it not?" It relates to a matter of fact, which is a matter of public record, and of which all men have constructive notice, and have the means of finding out. No elementary writer has ever laid down the rule that the purchaser of commercial paper is not bound to enquire into any matters relating thereto, except such matters as the courts will take judicial notice of; nor am I aware of any adjudged case where any such rule has been pronounced by any court until now.

This Court recognizes the binding authority of the decisions of the Supreme Court of Illinois, as to the validity of statutes of that State. That Court has said that the signatures of the Speakers and the Governor are *prima facie* evidence that the statute was constitutionally passed. What is "*prima facie* evidence"? Bouvier's Law Dictionary says, "it is sufficient evidence to establish the fact, "*unless rebutted.*" The very phrase, "*prima facie* evi- "dence," imperatively implies, that it *may be rebutted.* The Supreme Court has again and again held that this very evidence may be rebutted. That is a part of the law of Illinois, and has been ever since 1853; yet this Court, professing to follow the law of Illinois, as laid down by its Supreme Court, decide in this case that it cannot be rebutted.

In the opinion we are examining, it is said, "The ques- "tion is * * * whether a law which * * * is appar-

"ently in force can be shown not to have been in fact "passed according to the requirements of the Constitution, "after parties have acted upon the faith of it, and changed "their condition." * * * "The Supreme Court of Illi- "nois has not yet, as we understand, decided the precise "question before us." The Court surely have not considered carefully the case of *The People, &c.*, v. *Starne*, (35 Ill., 121), or this remark could not have been made. In that case, the Governor of the State—acting in behalf of the State, on the faith of the supposed statute—bargained with Barnes, the captain of a steamer on the Mississippi River, and a non-resident of the State, (he, also, acting on the faith of the supposed statute), and under the supposed contract with the State, Barnes, on the faith of this supposed statute apparently in force, furnished supplies and transportation for the benefit of our sick and wounded soldiers, to the value of over $5,000. "After the parties" had thus acted "upon the faith of it and changed their "condition," the Supreme Court of Illinois decided that, as against Barnes, "a law which was apparently in force," *might and could* "be shown not to have been, in fact, "passed according to the requirements of the Constitu- "tion." This decision was made in 1864, five years before the bonds now under consideration were issued. This was the law of Illinois when these bonds were issued, and when the present holders bought them, and it is the law of Illinois to-day, unless the law of that State has been changed by the decision of this Court in these cases.

"The precise question," before this Court now, was directly decided in the case of *Ryan* v. *Lynch*, 68 Ill., 160. Ryan was the collector of taxes, and had a tax warrant for the collection of taxes, to pay the interest upon certain municipal bonds issued by the officers of the town of Ottawa, to the same Railroad Company, under this same supposed or apparent statute now before this court. Lynch, a taxpayer, filed a bill to enjoin the collection of the tax in

question, upon the ground that this apparent statute never passed the Senate. Ryan answered that the statute was signed by the Speakers and the Governor, lodged with the Secretary of State, and printed in the Session Laws, and set up in his answer that the bonds had been issued and passed into the hands of innocent holders, and that the town of Ottawa had paid interest upon them, and that the town was thereby estopped from claiming that the bonds were void. This is precisely the defence set up in the cases at bar. The Supreme Court held that under our Constitution the taxpayers were not thereby estopped. But it is said this defense in the Ryan case was set up by the tax collector and not by the bondholders. This is true, but does that make any difference in the nature of the question decided? If it is a sound position in the mouth of the bondholder, it surely was sound in the mouth of the tax collector. If the town was estopped from showing that this statute never passed, then it was the duty of the town to prepare to pay the bonds, and it was lawful for the town through its tax collector to collect the tax. The precise question then was *properly brought in judgment* in the Ryan-Lynch case, and was there decided. It was the precise question presented in this case, and stated by his Honor, The Chief Justice, in one place thus: "Can a mu-
"nicipal corporation that has issued its bonds and put
"them on the market as commercial paper, upon the faith
"of this law, be permitted to show, as against a *bona fide*
"holder of the bonds, that the law had never in fact been
"passed?" And in another place thus: "The question is
"whether a law which is apparently in force can be shown
"not to have been in fact passed after parties have acted
"upon the faith of it, and changed their condition?" These questions are in substance the same, and as I have shown have both been directly passed upon by the highest Court of Illinois. It is surely a mistake to say that that court "has not yet decided the precise question before us."

I might collate and present the authorities to show that no party is ever by law to be estopped from proving anything that he alleges to be true, unless the party proposing to make such proof (or some one for whose acts such party is bound) has done some act, of such solemnity that the law will not allow it to be denied, or has done some act affirmative or negative upon which some other party has relied, and thus has been misled, and by reason thereof has changed his condition. These principles are however elementary, and need no vindication. In these cases as already shown, every act relied upon as cause of estoppel, was done by persons having no lawful authority to bind the municipal corporation, by such acts. It requires the same power in an agent to accomplish an end by estoppel, that would be necessary to accomplish the same end by direct action. A person having no power to execute for me a bond, can not do in my behalf any act which will estop me from denying his authority. These suggestions are submitted with great respect, and with the hope that a closer examination of these cases will satisfy this Court that the present judgment of this Court can not be sustained without doing violence to certain sacred rules of law, which are of more importance by far than the decision of any one law suit.

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For the Plaintiffs in Error.